

A One Way Street to Unconstitutionality: The “Choose Life” Specialty License Plate

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The national debate on abortion is taking place in a new forum: specialty license plates that appear on motor vehicles. Under some state statutes, individuals may select a special license plate format that includes the message, “Choose Life,” by paying an extra fee. Further, the funds generated from those who select such a license plate format are entrusted to groups, such as Catholic Charities, that refuse to counsel abortion as an option for responding to an unwanted pregnancy. Not surprisingly, pro-choice advocates and organizations have argued that the statutes authorizing this practice are unconstitutional. This argument is correct to the extent that those who challenge the constitutionality of this policy base their challenges on the Establishment Clause and the free speech clause of the First Amendment. The state practice violates all three of the tests the Supreme Court has applied in its Establishment Clause jurisprudence: the Lemon test, the endorsement test, and the coercion test. Moreover, these statutes violate the free speech clause by engaging in impermissible viewpoint discrimination. Finally, this note concludes that the statement, “Choose Life,” should not appear on license plates at all, because an alternative forum exists for those who wish to express their views on abortion on their motor vehicles, namely, bumper stickers.

“[‘Choose Life’ is] a very innocuous statement that most people will agree with.”¹

“[‘Choose Life’ license plates] provide a way for the antichoice movement to spread propaganda with the help of the government.”²

“Related by antithesis, / A compromise between us is / Impossible.”³

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¹ Sharon Lerner, *A New Kind of Abortion War*, VILLAGE VOICE, Jan. 1, 2002, at 48 (quoting Florida Governor Jeb Bush).

² Alan Fisk, *Abortion Fight Takes to the Highways*, NAT’L L.J., Dec. 24, 2001, at A4 (quoting Simon Heller of the Center for Reproductive Law and Policy in New York).

³ W.H. AUDEN, COLLECTED SHORTER POEMS 1927–1957, at 222 (1966).

I. INTRODUCTION

In 1973, *Roe v. Wade*⁴ established that a woman had a fundamental right to terminate her pregnancy and that regulations restricting access to abortion must be justified by a "compelling state interest,"⁵ intensifying the national debate regarding the constitutionality of abortion. Although *Planned Parenthood v. Casey*⁶ later reaffirmed that a woman has a right to have an abortion before viability without undue influence from the state,⁷ the case also emphasized the importance of a state's interest in the life of the fetus.⁸ Now, thirty years since *Roe*, automobile license plates are the latest location of the struggle to protect and promote both the judicially recognized importance of potential life and a woman's constitutional right to choose to have an abortion.⁹ While other

⁴ 410 U.S. 113 (1973).

⁵ *Id.* at 152–56 (stating that the constitutional right to privacy encompassed a woman's right to choose an abortion and that although this fundamental right was not unqualified, it may only be restricted by a compelling state interest).

⁶ 505 U.S. 833 (1992).

⁷ *Id.* at 846 (reaffirming what the *Casey* plurality believed to be *Roe*'s three-part "essential holding": (1) "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"; (2) "confirmation of the State's power to restrict abortions after fetal viability," with exceptions for the mother's health or life; and (3) "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus").

⁸ *Id.* at 871–73 (rejecting *Roe*'s trimester framework governing restrictions on abortions because that framework failed to provide adequate protection to the state's significant interest in potential life). Significantly, instead of utilizing (as *Roe* did) a strict scrutiny standard to determine whether a restriction on abortion was permissible, the *Casey* plurality determined that the proper way to acknowledge and protect the state's substantial interest in the life of the fetus was to analyze abortion restriction under an "undue burden" standard. *Id.* at 876–77. This "undue burden" standard safeguards the state's interest in potential life by permitting constraints on the right to terminate a pregnancy so long as the regulation does not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*

⁹ Over one thousand newspaper articles have reported on this nationwide abortion debate in the context of automobile license plates since 1997. See, e.g., *Alabama Abortion Foes Win OK for 'Life' License Plate*, DESERET NEWS (Salt Lake City), Oct. 24, 2001, at A5 ("Legislatures in Florida, South Carolina and Louisiana have approved 'Choose Life' license plates. All are being challenged in court, and Florida's tag is the only one that has appeared on cars."); Howard Kleinberg, *Ideological Collisions Better Left off the Road*, TAMPA TRIB., Sept. 28, 1997, at 6 ("We've got enough to be irritated about on the highway without having to deal [with] . . . an issue as sensitive and divisive as abortion [on a license plate]."); Brett Martel, *'Choose Life' Plate Raises Ire in La.*, COM. APPEAL (Memphis), July 24, 2000, at A6 (responding to the pro-life plates, "[t]he ACLU is now considering legal action to remove [state] lawmakers' authority to approve specialty license plates altogether."); Waldo Proffitt, *'Choose Life' Tag Like Pouring Gasoline on a Raging Fire*, SARASOTA HERALD-TRIB., Mar. 11, 1999, at 16A ("The state simply has no business taking sides in what may well be the most

messages on license plates previously caused constitutional challenges,¹⁰ the current dispute on whether to permit abortion-related statements on license plates generates significant television and radio coverage¹¹ of the public outcry on both sides and the resulting political quandary for many state legislators on how to proceed.

This ongoing license plate debate focuses on pro-life organizations' efforts to display an anti-abortion message, such as "Choose Life,"¹² on "specialty" license

intractable dispute in the country."); *Right to Choose a Veto*, SARASOTA HERALD-TRIB., May 23, 1998, at 18A ("Politically loaded slogans—whether 'Pro-Choice' or 'Choose Life'—belong on bumper stickers, not government sanctioned license plates.").

¹⁰ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 707, 715–17 (1977) (holding that state residents' free speech rights were violated when New Hampshire enforced criminal sanctions against persons who covered up the state motto "Live Free or Die" on passenger license plates because the persons found the message morally objectionable); *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 946–47 (W.D. Va. 2001) (finding that Virginia impermissibly engaged in viewpoint discrimination when it banned an organization's Confederate flag logo on its specialized license plate); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1104–05 (D. Md. 1997) (enjoining state officials from recalling or failing to issue a group's Confederate flag logo on its specialized license plates because doing so would violate the First Amendment right of free speech).

¹¹ Since 1997, over 1200 television and radio programs, local and national, have reported on the developing license plate controversy. See, e.g., *Eyewitness News* (WSOC-TV television broadcast, Nov. 20, 2001) ("A Federal Judge in Charleston has barred South Carolina from producing Choose Life license plates."); *All Things Considered*—NPR (National Public Radio broadcast, Aug. 20, 2001) ("This year, sixteen states considered some kind of specialty license plates with an anti-abortion message."); *Politically Incorrect* (ABC television broadcast, July 26, 2000) ("The Louisiana Legislature adopted pro-life license plates. . . . People do kill others over this [abortion] issue."); *NPR Morning Edition* (National Public Radio broadcast, Apr. 30, 1998) (NPR guest Kate Michaelman commenting: "For the state to take a position on one side over another [in the abortion issue], and even earn money on it . . . [aimed at] supporting anti-choice activities, is extraordinary."); *7 News Weekend* (WSVN-TV television broadcast, Feb. 15, 1997) ("[An automobile license t]ag which would feature two kids with the word[s] choose life underneath is coming under fire.").

Recent law review articles have also examined the issue. See, e.g., Jeremy T. Berry, Comment, *Licensing a Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605 (2002).

¹² See, e.g., *Alabama Abortion Foes*, *supra* note 9 (stating that several state legislatures have approved "Choose Life" license plates); Fisk, *supra* note 2 (noting that a couple of states have passed laws issuing a "Choose Life" license plate and that other states also considered doing the same); *Group Opposes "Choose Life" Plates*, ADVOCATE, Sept. 7, 2001, at 8-A, LEXIS, News Library, News Group File, All (reporting that the South Carolina legislature had approved "Choose Life" license plates); *Anti-Abortion Plates Get OK in Alabama*, RECORDER, Oct. 25, 2001, at 9 (noting that some state legislatures have approved "Choose Life" license plates).

According to Choose Life, Inc., at least forty-three states have pro-life specialty license plate efforts in progress including: Alabama, Arizona, Arkansas, California, Connecticut, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky,

plates.¹³ Particularly controversial about this issue is that the proceeds generated from the pro-life plates may only go to organizations that do not offer or discuss abortion as an option for women who are uncertain on how to proceed with an unintended pregnancy.¹⁴

Pro-choice groups object to the production of these plates, claiming, in general, that state statutes authorizing the anti-abortion license plates are unconstitutional under the First Amendment Establishment Clause by impermissibly delegating governmental functions to Christian fundamentalist organizations that decide how to distribute the license plate proceeds.¹⁵ In

Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. Other States . . . , Choose Life, Inc., at <http://www.choose-life.org/states.php> (last visited May 24, 2003). Choose Life, Inc. is an organization created for the purpose of creating "a specialty license plate with the slogan 'Choose Life' whose proceeds would be used to facilitate and encourage adoption as a positive choice for women with unplanned pregnancies." About Us >> Purpose, Choose Life, Inc., at <http://www.choose-life.org/purpose.html> (last visited May 24, 2003).

¹³ Specialty license plates, also known as "specialized" license plates or "prestige plates," are distinct from "vanity plates": "Vanity plates are where a state will customize the arrangement of letter [sic] and numbers to create a plate for *one individual and it cannot be duplicated*. A prestige plate [or] specialty plate is where a license plate is created to refer to a specific group like the Shriners or a school." *Henderson v. Stalder*, 112 F. Supp. 2d 589, 597 n.5 (E.D. La. 2000) (emphasis added), *rev'd, vacated, and remanded by* 287 F.3d 374 (5th Cir. 2002). Thus, having a license plate that displays a school name and/or school logo such as "The Ohio State University" with a buckeye in the background of the plate is a *specialty* license plate. On the other hand, a plate whose actual numbers or letters spell out a phrase such as "RICH DOC 1" is a *vanity* license plate. Several people may purchase the former plate, while only one person may have the latter. *Id.*

¹⁴ See, e.g., FLA. STAT. ANN. § 320.08058(30)(b) (West 2001) (stating that the annual plate fees shall go to organizations whose "services are limited to counseling and meeting the physical needs of pregnant women who are committed to placing their children [up] for adoption. Funds may not be distributed to any agency that is involved or associated with abortion activities."); LA. REV. STAT. ANN. § 47:463.61(F)(2) (West 2001). The Louisiana statute provides that in order for an organization to receive plate funds it must

demonstrate [that] it provides counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child. No monies deposited into the fund shall be distributed to any organization involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising.

Id.; S.C. CODE ANN. § 56-3-8910(B) (Law. Co-op. 2002) (requiring that pro-life license plate monies "may not be awarded to any agency, institution, or organization that provides, promotes, or refers for abortion").

¹⁵ See, e.g., *Women's Emergency Network v. Bush*, 191 F. Supp. 2d 1356, 1361 (S.D. Fla. 2002) (noting that the pro-choice plaintiffs "raised an as applied challenge to the Counties' alleged delegation of their distribution responsibilities [of funds generated by pro-life plates] to

addition, pro-choice advocates contend that these statutes also violate the Free Speech Clause because the laws discriminate on the basis of viewpoint by only presenting one side of the abortion debate.¹⁶ Anti-abortion groups, on the other hand, respond with several arguments, including: (1) that the plate funds go to adoption agencies and not to religious organizations;¹⁷ (2) that pro-choice advocates are not compelled to purchase the anti-abortion plates;¹⁸ (3) that in a state where pro-choice groups could not show that they petitioned for their own plate and were rejected, the pro-choice groups could not establish they had suffered a direct injury to their First Amendment free speech rights;¹⁹ and (4) that pro-choice advocates lack standing to challenge state statutes authorizing pro-life plates.²⁰ Decisions and restrictions have gone in favor of both groups in the two states presented with these conflicting arguments in litigation.²¹

This note examines these claims of alleged Establishment Clause and free speech rights and violations in the context of specialty license plates that espouse

Catholic organizations,” violating the First Amendment’s Establishment Clause); *Henderson*, 112 F. Supp. 2d at 592–93 (stating pro-choice plaintiffs’ argument that by delegating “governmental functions [the power to distribute license plate funds] to Christian fundamentalist organizations and that . . . the Act places the State’s imprimatur on fundamentalist Christian beliefs and that the statute thus violates the Establishment Clause”); Rosaland Briggs Gammon, *Florida Officials Sued over State’s Anti-Abortion Auto Tags*, BLOOMBERG NEWS, Jan. 23, 2002, LEXIS, News Library, Bloomberg—All Bloomberg News File (reporting that a recent lawsuit filed against Florida Governor Jeb Bush and other officials “contends that the state violates the U.S. Constitution by allowing religious organizations that receive plate proceeds to distribute those funds to other anti-abortion groups”).

¹⁶ See, e.g., *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564, 566 (D.S.C. 2002) (noting that pro-choice plaintiffs allege that the statute “infringes the First Amendment by discriminating on the basis of viewpoint”); *Henderson*, 112 F. Supp. 2d at 595 (noting that pro-choice plaintiffs argued a First Amendment violation because only the “pro-life viewpoint [may be] expressed via special license plates and pro-choice car owners are not given the option of expressing their view on their license plates”) (citation omitted); *Hildreth v. Dickinson*, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *8 (M.D. Fla. Dec. 22, 1999) (stating that pro-choice plaintiffs asserted the statute discriminated on the basis of viewpoint by only presenting one opinion about the abortion debate and therefore acted contrary to the First Amendment).

¹⁷ *Henderson*, 112 F. Supp. 2d at 593.

¹⁸ *Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *12.

¹⁹ *Id.*

²⁰ *Women’s Emergency Network*, 191 F. Supp. 2d at 1360.

²¹ *Rose*, 236 F. Supp. 2d at 574 (holding that plaintiffs had standing and that the statute authorizing the “Choose Life” plate was unconstitutional); *Henderson*, 112 F. Supp. 2d at 601–02 (finding pro-choice plaintiffs’ free speech had been abridged and issuing an injunction to halt production of “Choose Life” specialty license plates), *rev’d, vacated, and remanded by* 287 F.3d 374, 382 (5th Cir. 2002) (holding that the pro-choice “plaintiffs in this case have not shown that they have standing to challenge the constitutionality” of the pro-life license plate statute); *Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *21 (rejecting pro-choice plaintiffs’ First Amendment claims, permitting production of pro-life plates).

a position regarding abortion. Part II presents a background of free speech precedent regarding license plates and abortion rights. In addition, this section provides an overview of recent free speech challenges against the "Choose Life" license plates. Next, Part III considers the Establishment Clause arguments regarding both how the funds are distributed and who distributes those funds to pro-life groups; this section also examines the language itself printed on the plate. Finally, Part IV contends that, in light of both the foregoing free speech and Establishment Clause jurisprudence, license plates cannot display the "Choose Life" message. This note also concludes that the abortion subject matter should not appear at all on specialty license plates, particularly because bumper stickers provide a sufficient alternative means of expression.

II. THE ESTABLISHMENT CLAUSE CHALLENGE

Pro-choice advocates contend that the "Choose Life" plates²² violate the Establishment Clause of the First Amendment. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion"²³ Since its promulgation, however, this statement by the Framers appears vague, especially in its failure to define the meaning of "establishment."²⁴

²² The Florida pro-life plate is a school-bus-yellow plate with child-like sketches [also described as "crayon-style drawings"] of a smiling boy and girl and the words "Choose Life." Jim Tunstall, *Abortion Foes Seek Special Tag*, TAMPA TRIB., Mar. 11, 1997, at 1; *Choose Life Plate on Hold for Challenge*, STUART NEWS/PORT ST. LUCIE NEWS, Dec. 11, 1999, at B5. The Louisiana design, on the other hand, portrays the words "Choose Life" with "a picture of a baby wrapped in a blanket in the beak of a brown pelican, the state bird." Joe Gyan, Jr., *Louisiana to Appeal Ruling on "Choose Life" License Plate*, ADVOCATE (Baton Rouge), Oct. 3, 2000, at 7-B, LEXIS, News Library, News Group File, All. For a pictorial list of other potential state plates, see <http://www.choose-life.org/states.php> (last visited May 24, 2003).

²³ U.S. CONST. amend. I. The Establishment Clause is applicable to the states through the Fourteenth Amendment. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

²⁴ *See, e.g., Ashley M. Bell, Comment, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1275 (2001).

In this article, the author notes that "[t]he Framers were not clear in their attempt to explain the proper role of religion in the public realm." *Id.* The article also observes that other scholars have stated that "[t]he history of the drafting of the Establishment Clause does not provide us with an understanding of what was meant by 'an establishment of religion.'" *Id.* at 1275 n.8 (citing LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 102–05 (Univ. of North Carolina Press 2d ed. 1994)); *see also* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1536 (1995) ("Despite the articulated mandates in the First Amendment, little consensus exists on the constitutional parameters of the religion clauses, particularly the Establishment Clause."); *cf. Carole F. Kagan, Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 621–22 (1995) (observing that Supreme Court Justices have fashioned different theories for applying the Establishment Clause); Kristin J. Graham, Comment, *The Supreme Court Comes Full*

A. General Background of the Establishment Clause

Lacking clear guidance from the Framers, the Supreme Court has not consistently applied the same Establishment Clause analysis throughout the years, confusing lower courts and leading to inconsistent decisions.²⁵ The three main tests that the Supreme Court employs to determine whether there has been an Establishment Clause violation include: (1) the *Lemon* test; (2) the endorsement test; and (3) the coercion test.²⁶

This first test, however, articulated as a three-step analysis by the Supreme Court in the 1971 case *Lemon v. Kurtzman*,²⁷ persists as the Court's primary test.²⁸ Under the *Lemon* inquiry, the statute in question must meet the following criteria²⁹ if it is to survive: (1) it must have a secular legislative purpose;³⁰ (2) its

Circle: Coercion as the Touchstone of an Establishment Clause Violation, 42 BUFF. L. REV. 147, 148 (1994) (noting that the United States Supreme Court, charged with the duty of interpreting the Establishment Clause over the last two hundred years, has not created an enduring framework or Establishment Clause test).

²⁵ See, e.g., Thomas R. Hensley & G.R. Jarrod Tudor, *An Analysis of the Rehnquist Court's Establishment Clause Jurisprudence: A New Marriage of Legal and Social Science Approaches*, 1999 L. REV. MICH. ST. U. DETROIT C.L. 869, 909 (noting that Supreme Court Establishment Clause jurisprudence has left the lower courts "with little clear guidance"); Theologos Verginis, *ACLU v. Capitol Square Review and Advisory Board: Is There Salvation for the Establishment Clause? "With God All Things Are Possible"*, 34 AKRON L. REV. 741, 742 (2001) ("Establishment Clause jurisprudence has been in a disconcerting state. Much of the chaos has centered around the Supreme Court's unwillingness to adhere to one doctrinal perspective."); Joel Brady, Comment, *"Land Is Itself a Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 163 (1999/2000) ("The Supreme Court's Establishment Clause jurisprudence has not been clear. Much of the confusion is due to the fact that the Court has employed different tests, while never explicitly overruling previous tests."); Rebecca E. Lawrence, Comment, *The Future of School Vouchers in Light of the Past Chaos of the Establishment Clause Jurisprudence*, 55 U. MIAMI L. REV. 419, 442 (2001) ("The Supreme Court's shift in its Establishment Clause jurisprudence has left lower courts in a state of confusion.").

²⁶ See, e.g., Jeanne Anderson, *The Revolution Against Evolution, or "Well, Darwin, We're Not in Kansas Anymore"*, 29 J.L. & EDUC. 398, 399-401 (2000) (noting these are the three principal tests used by the Supreme Court); Deborah A. Reule, Note, *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, 54 VAND. L. REV. 2555, 2565-68 (2001) (describing these three main tests). See also *infra* Part IV.A.3 for more discussion regarding all of these tests.

²⁷ 403 U.S. 602, 612-13 (1971).

²⁸ See *infra* note 35 and accompanying text for law indicating that the *Lemon* test is still valid.

²⁹ *Lemon*, 403 U.S. at 612-13 (describing the three elements).

³⁰ For cases discussing what has not constituted a secular purpose, see *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (declaring unconstitutional a state law that required public schools to teach "creation science . . . because the primary purpose of the Creationism

principal effect must be one that neither advances nor inhibits religion;³¹ and (3) the statute must not foster an excessive government entanglement with religion.³² Although criticized³³ and ostensibly modified,³⁴ the Court has not yet explicitly overruled this test.³⁵

Act is to endorse a particular religious doctrine, . . . [thus] further[ing] religion in violation of the Establishment Clause"); *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (finding unconstitutional a Kentucky statute that required the Ten Commandments be posted on the wall of each public school classroom because the statute did not serve a secular purpose); and *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963) (rejecting the argument that the reading of Bible verses in public schools served the secular purpose of the "promotion of moral values" in children).

³¹ See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (permitting an exemption for religious organizations from employment discrimination under Title VII because there was no evidence that "the government itself has advanced religion through its own activities and influence"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 710–11 (1985) (declaring that a state statute that provides Sabbath observers the right not to work on their Sabbath "has a primary effect that impermissibly advances a particular religious practice," thus violating the Establishment Clause).

³² See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–95 (1993) (permitting the presentation of a film series regarding Christian family issues because the showing would "not foster an excessive entanglement with religion"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 394–95 (1990) (holding that the state's "imposition of sales and use tax liability on [the religious organization] threatens no excessive entanglement between church and state").

³³ See *infra* note 145 and accompanying text.

³⁴ *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997); see also Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Educational Institutions: A More Rational Approach After Rosenberger and Agostini*, 82 MARQ. L. REV. 1, 38 (1998) ("Agostini substantially reworked the second prong of the *Lemon* test and eliminated the third prong as a separate test."); Jeremy T. Bunnow, Note, *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133, 1133 (noting that *Agostini* "created a 'significant change' in Establishment Clause jurisprudence"); David S. Petron, Note, *Finding Direction in Indirection: The Direct/Indirect Aid Distinction in Establishment Clause Jurisprudence*, 75 NOTRE DAME L. REV. 1233, 1244–45 (2000) (stating that *Agostini* modified the *Lemon* test and that it changed "the criteria used to assess whether aid to religion has an impermissible effect") (citation omitted).

³⁵ For sources noting that the *Lemon* test has not been overruled and is still good law, see James E.M. Craig, Comment, *"In God We Trust," Unless We Are a Public Elementary School: Making a Case for Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 536–37 (2000); Robert L. Kilroy, Note, *A Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of Rosenberger v. Rector & Visitors of the University of Virginia*, 6 CORNELL J.L. & PUB. POL'Y 701, 702 (1997); Devon M. Lehman, Comment, *The Godless Graduation Ceremony?: The State of Student-Initiated Graduation Prayer After Lee v. Weisman and Santa Fe Independent School District v. Doe*, 72 U. COLO. L. REV. 175, 179–80 (2001).

B. Previous Application of the Lemon Test to Pro-Life License Plates and the Distribution of Plate Funds

In the states passing legislation permitting the production of pro-life license plates,³⁶ only organizations that do not mention or counsel abortion as an option are eligible for the funds generated from the sale of the plates.³⁷ Therefore, groups such as Planned Parenthood, which counsel about and provide abortion services,³⁸ are denied the opportunity to apply for these funds.³⁹ Because they are ineligible for the funds, these organizations have filed complaints on the distribution issue.⁴⁰ These pro-choice groups allege that the distribution of plate

³⁶ The states all have basic requirements that must be followed when applying for a specialty license plate. Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 425 (2001). These requirements may include signatures of a certain number of vehicle owners who plan to purchase the proposed plate, an application fee of up to \$60,000 to defray state's expenses, marketing plans, and financial analysis of anticipated revenue. *Id.* The states have various requirements for specialty license plates. See FLA. STAT. ANN. § 320.08053 (West 2001); LA. REV. STAT. ANN. § 47:463.61 (West 2001); S.C. CODE ANN. § 56-3-8000 (Law. Co-op. 2000).

³⁷ See *supra* note 14 and accompanying text. The Florida statute, for example, allows each county to administer the money it raises. Mark Hollis, *Judge Dismisses Choose Life Suit; Attorney to Go to High Court*, SUN-SENTINEL (Ft. Lauderdale), Nov. 22, 2001, at 6B. Approximately 25,000 pro-life plates were sold in Florida in 2001, placing that plate as the thirteenth most popular out of fifty-three other specialty plates. Drew Dixon, 'Choose Life' License Money to Be Distributed, STUART NEWS/PORT ST. LUCIE NEWS, Jan. 8, 2002, at C2. About \$20.00 per plate may go to eligible organizations. Hollis, *supra*. As a result of the high sales, the funds generated from the sale of pro-life plates over one year in Florida are significant: \$682,674 in revenue. Gammon, *supra* note 15.

³⁸ Planned Parenthood's website offers detailed information designed to educate women considering abortion as an option to an unwanted pregnancy, Abortion: Choosing Abortion: Questions & Answers, Planned Parenthood, at <http://www.plannedparenthood.org/ABORTION/chooseabort1.html> (last visited May 24, 2003). For example, a link at this site explains the basics about surgical abortions, including steps to take prior to obtaining a surgical abortion (such as counseling), special arrangements that may need to be made, and a general description of the three most common methods of surgical abortion: manual vacuum aspiration, dilation and suction curettage, and dilation and evacuation. Abortion: Surgical Abortion—Questions & Answers, Planned Parenthood, at <http://www.plannedparenthood.org/ABORTION/surgabort1.html> (last visited May 24, 2003).

³⁹ See *supra* note 14.

⁴⁰ See, e.g., *Henderson v. Stalder*, 112 F. Supp. 2d 589 (E.D. La. 2000), *rev'd, vacated, and remanded by* 287 F.3d 374 (5th Cir. 2002) (considering whether the state delegated governmental functions to religious organizations when it permitted said organizations to distribute funds generated from the sale of pro-life plates). In addition, a pro-choice plaintiff (Florida National Organization for Women) filed suit in a Florida state court contesting the distribution of funds to religious organizations. Hollis, *supra* note 37. Although that case was dismissed in November 2001, the plaintiff plans to appeal the decision. *Id.*

funds targeted to religious groups opposing abortion violates the Establishment Clause.⁴¹

1. *Henderson v. Stalder*⁴²

Demonstrating that language such as “Choose Life” on a pro-life specialty plate violates all three of the *Lemon* elements has so far proven a formidable battle for pro-choice advocates. In *Henderson I*, for instance, the disputed Louisiana statute provided that revenue generated from the anti-abortion specialty plates would be distributed by the State Treasurer upon the recommendation of a “Choose Life” Advisory Council, composed of the American Family Association, the Louisiana Family Forum, and the Concerned Women of America.⁴³ The generated funds were to go to organizations that counsel pregnant women to place their children up for adoption and not to any organization that “is involved in or associated with abortion clinics or pro-abortion advertising.”⁴⁴ The pro-choice plaintiffs contended that, as a result of these provisions, the statute “delegates governmental functions to Christian fundamentalist organizations and that the three council members subscribe to and actively promote Christian fundamentalist beliefs as set forth in their organization’s mission statements,” thus violating the Establishment Clause.⁴⁵

The Louisiana district court ultimately rejected plaintiffs’ argument.⁴⁶ First, it noted that the statute served an established secular purpose already recognized by the courts: dealing with unwanted pregnancies.⁴⁷ Second, plaintiffs’ argument did not persuade the court that the statute had the primary effect of advancing a particular religion.⁴⁸ Indeed, the court noted, “there is no proof that any of the three groups [composing the council that directs distribution of funds] would constitute a religious institution for the purpose of this analysis.”⁴⁹ Moreover, in issuing funds to different groups, the court determined that no preference was made for sectarian groups to receive the license plate money.⁵⁰ Finally, the

⁴¹ Hollis, *supra* note 37.

⁴² 112 F. Supp. 2d 589 (E.D. La. 2000) (“*Henderson I*”), *rev’d, vacated, and remanded by* 287 F.3d 374 (5th Cir. 2002) (“*Henderson II*”), *cert. denied*, 123 S. Ct. 602 (2002). *Henderson II* is not relevant to this Establishment Clause discussion. The injunction entered by the district court that *Henderson II* reversed was based primarily on a free speech challenge, addressed in *infra* Section III.

⁴³ *Henderson*, 112 F. Supp. 2d at 592.

⁴⁴ *Id.*

⁴⁵ *Id.* at 593.

⁴⁶ *Id.*

⁴⁷ *Id.* at 593–94.

⁴⁸ *Id.* at 594.

⁴⁹ *Henderson*, 112 F. Supp. 2d at 594.

⁵⁰ *Id.*

possibility that advancing religion may be an incidental effect of the statute was not enough for the court to invalidate it under the Establishment Clause.⁵¹

The Fifth Circuit, too, rejected plaintiffs' Establishment Clause argument, finding that the plaintiffs lacked standing as taxpayers to challenge the "Choose Life" plates.⁵² The court did not find that plaintiffs suffered a concrete and particularized injury because no evidence demonstrated that Choose Life Council members who distribute the plate funds "have actually advanced the religious ideologies of their respective organizations or religion in general."⁵³ Moreover, the "Choose Life" statute contradicted plaintiffs' argument that state income tax dollars were used for the Choose Life Council or the Choose Life Fund administration.⁵⁴ As a result, plaintiffs had no standing to challenge the statute on the basis of the Establishment Clause.⁵⁵

2. Women's Emergency Network v. Bush⁵⁶

In a Florida federal court, the Women's Emergency Network and Emergency Medical Assistance, Inc., both pro-choice organizations,⁵⁷ challenged Florida's alleged delegation of plate fund distribution to a Catholic organization.⁵⁸ The pro-choice plaintiffs sought a preliminary injunction or temporary restraining order prohibiting distribution of the pro-life plate monies.⁵⁹ The plaintiffs claimed that permitting a Roman Catholic organization to distribute state funds generated from license plate sales violates the Establishment Clause.⁶⁰

⁵¹ *Id.* at 594–95.

⁵² *Henderson v. Stalder*, 287 F.3d 374, 379–81 (5th Cir. 2002). The court stated that both the individual and the state plaintiffs lacked standing. *Id.*

⁵³ *Id.* at 380.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 191 F. Supp. 2d 1356 (S.D. Fla. 2002). On July 12, 2002, the court determined that Governor Bush was not a proper party to this lawsuit, granting his motion to dismiss. *Women's Emergency Network v. Bush*, 214 F. Supp. 2d 1316 (S.D. Fla. 2002). Thus, the case name became *Women's Emergency Network v. Dickinson*, 214 F. Supp. 2d 1308 (S.D. Fla. 2002).

⁵⁷ Both the Women's Emergency Network and Emergency Medical Assistance, Inc. are listed members of the National Network of Abortion Funds ("NNAF") eligible for abortion funds. See NNAF, at http://www.nnaf.org/perl/xioutput.cgi?output=record&config=publicmemout&get_record=state:FL (last visited May 24, 2003) (listing fund members in Florida).

⁵⁸ *Women's Emergency Network*, 191 F. Supp. 2d at 1361.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1361–62.

In February 2002, the district court, while not considering the plaintiffs' as-applied and facial challenges because they lacked standing,⁶¹ denied plaintiffs' motion for a preliminary injunction barring distribution of the funds.⁶²

Later, in July 2002, the court determined that the plaintiffs lacked taxpayer standing and rejected their substantive Establishment Clause challenges.⁶³ According to the court, the individual plaintiffs did not have taxpayer standing to challenge the "Choose Life" statute because they failed to demonstrate that county funds were used to distribute the Choose Life funds.⁶⁴ Indeed, the court noted that the statute's express language provided that the plate funds would be used for distribution costs.⁶⁵

In addition, the court rejected plaintiffs' claim that any agency distributing the funds would advance a religious ideology.⁶⁶ Satisfied that Catholic Charities distributed a particular county's funds "equally among all qualified agencies," the court noted that the plaintiffs failed to establish that "any regard has been given to religious affiliation."⁶⁷ As a result, the plaintiffs did not establish an actual injury and thus lacked standing.⁶⁸

C. Establishment Clause Challenge Based on Pro-Life Religious Message

In addition to Establishment Clause challenges directed at the manner in which funds are distributed, critics also denounced the "Choose Life" message itself as religious. Pro-choice advocates in Florida, for example, filed a lawsuit in late 1999 seeking to stop issuance of the plates based on the plates' pro-life message.⁶⁹ In that case, the plaintiffs asserted that the phrase "Choose Life" was derived from⁷⁰ the Old Testament book of Deuteronomy, blurring the boundary

⁶¹ *Women's Emergency Network*, 191 F. Supp. 2d at 1364 ("Because the Court has concluded that it cannot enter the injunction requested by [pro-choice] Plaintiffs [enjoining production of the license plates] . . . it would be premature to consider the Plaintiffs' as-applied and facial challenges of the Act at this time.").

⁶² *Id.*

⁶³ *Women's Emergency Network v. Bush*, 214 F. Supp. 2d 1308 (S.D. Fla. 2002). The court also rejected plaintiffs' challenges based on free speech violations. *Id.* at 1313–15. For a discussion of that issue, see *infra* Part III.A.

⁶⁴ *Women's Emergency Network*, 214 F. Supp. 2d at 1314.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See, e.g., Cristin Kellogg, *Pro-Life Floridians Fight for Right to Drive Home a Point; NOW Stalls 'Choose Life' Plates*, WASH. TIMES, Mar. 8, 2000, at A2; Nancy L. Othon, *Challenge to 'Choose Life' Tags Is Based on Issues of Religion*, SUN-SENTINEL (Ft. Lauderdale), Nov. 25, 1999, at 1B.

⁷⁰ Hollis, *supra* note 37.

between church and state:⁷¹ “I have set before you life and death, blessing and cursing. Therefore *choose life*, that both thou and thy seed may live. . . .”⁷² Moreover, plaintiffs contended, “Choose Life” is a slogan associated with the anti-abortion movement.⁷³ Ultimately, these arguments failed to persuade the circuit court, which dismissed the complaint in November 2001, holding that “[n]o facts are alleged to support the conclusory assertions of excessive government entanglement with religion.”⁷⁴

III. THE FREE SPEECH CHALLENGE

Although “Choose Life” opponents alleged Establishment Clause⁷⁵ (and Equal Protection⁷⁶) violations to prevent production of the plates, the First

⁷¹ Sara Rimensnyder, *Plate Debate: Political Motorists*, REASON, Jan. 1, 2002, at 14.

⁷² *Deuteronomy* 30:19 (King James) (emphasis added).

⁷³ Kellogg, *supra* note 69; Othon, *supra* note 69.

⁷⁴ Jim Ash, Judge: ‘Choose Life’ Plate Doesn’t Break Law on Religion, PALM BEACH POST, Nov. 22, 2001, at 3B. The attorney for the plaintiffs in that case, Barry Silver, plans to appeal that decision, hoping the First District Court of Appeals will bump his appeal directly to the Florida Supreme Court to decide. *Id.*

⁷⁵ See *supra* Section II.

⁷⁶ See, e.g., *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564 (D.S.C. 2002). The Equal Protection Clause provides that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The plaintiffs in *Rose* alleged, for example, that enforcement of a state statute authorizing the production of pro-life plates presented a violation of this clause. *Rose*, 236 F. Supp. 2d at 566. Similar to a previous statute enacted in Florida, the South Carolina act specifically provided that the funds generated from the sale of these plates may not be disbursed to “any agency, institution, or organization” that “provides, promotes or refers for abortion.” Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction at 2, *Rose*, (D.S.C. filed Oct. 18, 2001) (No. 2-01-3571-23). In addition, the disputed statute did not provide for a pro-choice plate that would generate similar funds for which Planned Parenthood would be eligible. *Id.* at 3. As a result of Planned Parenthood’s disqualification from funds generated by plates addressing the abortion issue, plaintiffs alleged that the statute penalized them for exercising their constitutional rights. *Id.* at 2–3. Further, the plaintiffs noted that “government may not deny eligibility for a benefit where the reason for the denial is tied to the exercise of constitutional rights.” *Id.* at 12. “[B]y disqualifying [Planned Parenthood] from eligibility for grants . . . because it provides abortion, the Act violates the rights of [Planned Parenthood’s] patients to choose abortion” and thus operates as “an unconstitutional penalty.” *Id.* at 12–13.

The District Court of South Carolina did not rule on the merits of this argument because the statute was found unconstitutional on First Amendment grounds. This equal protection argument, however, appears unlikely to be successful in future cases if raised in light of past United States Supreme Court precedent permitting the government to provide funds to clinics that do not provide or refer abortions. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”).

Amendment free speech claim has emerged as the most successful challenge to date in a district court in prohibiting anti-abortion messages from appearing on specialty license plates.⁷⁷

The Free Speech Clause of the First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech."⁷⁸ Justice Cardozo previously described this freedom of speech as "the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal."⁷⁹ Despite this strong tradition of protecting speech, however, the First Amendment does not guarantee an absolute right to speak regardless of the context and content of the speech.⁸⁰ Finally, state regulation of speech, in any type of forum, must be viewpoint neutral.⁸¹

⁷⁷ See, e.g., *Rose*, 236 F. Supp. 2d at 572, 574 (finding statute permitting "Choose Life" license plate was unconstitutional because it constituted viewpoint discrimination).

⁷⁸ U.S. CONST. amend. I. The right of free speech is applicable to the states through the Fourteenth Amendment Due Process Clause. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

⁷⁹ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

⁸⁰ See, e.g., *Gitlow*, 268 U.S. at 666; *Schenck v. United States*, 249 U.S. 47, 51–52 (1919); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (noting that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language"); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Gitlow, 268 U.S. at 666; see also *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

⁸¹ "[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate." *Rosenberger v. Rector*, 515 U.S. 819, 894 (1995) (Souter, J., dissenting). For a discussion of what is viewpoint neutrality or viewpoint discrimination, see, for example, *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."); *Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting) ("Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

A. The Abortion/Free Speech Debate in Other Distinct Venues

Automobile license plates were not the first context where the abortion debate and First Amendment rights collided. Sidewalks and areas outside of abortion clinics, for example, raised free speech issues when increasing violence and blockades directed against abortion offices in the early 1990s prompted the enactment of the Freedom of Access to Clinic Entrances Act of 1994 (hereinafter "FACE" or "the Act").⁸² FACE prohibited any person from using force or the threat of force or physical obstruction intentionally to injure (or attempt to injure), to intimidate, or to interfere with any person because that person is or has been obtaining or providing reproductive health services.⁸³ Subsequent to its enactment, abortion protesters opposed FACE, asserting that the Act violated the Free Speech Clause of the First Amendment because it restricted pro-life activists' freedom of expression and unlawfully constrained the expression based on its viewpoint.⁸⁴ Courts presented with these First Amendment challenges have

⁸² 18 U.S.C. § 248 (2001); see, e.g., *United States v. Wilson*, 154 F.3d 658, 661 (7th Cir. 1998) (stating that Congress enacted FACE to deal with increasing violence surrounding clinics that offered abortion services). After the shooting of two abortion doctors just outside of their clinics in 1993, the Senate and House passed the bills that later became FACE. Katherine A. Hilber, Note, *Constitutional Face-Off: Testing the Validity of the Freedom of Access to Clinic Entrances Act*, 72 U. DET. MERCY L. REV. 143, 162–63 (1994) (noting the fatal shooting of abortion doctor David Gunn in March 1993, the shooting of abortion doctor George Tiller, and that the Senate passed the bill by a vote of sixty-nine to thirty and by a voice vote in the House).

Numerous articles describe the escalating violence outside of abortion clinics by pro-life extremists in the early 1990s that prompted FACE. See *Abortion Protester Held in Doctor's Murder at Clinic*, L.A. TIMES, Mar. 11, 1993, at A1; *Doctor Slain During Abortion Clinic Protest*, CHI. TRIB., Mar. 11, 1993, at 2; Barbara Mulhern, *Both Abortion Sides Here Denounce Slaying*, CAP. TIMES (Madison, Wis.), Mar. 11, 1993, at 1A; Larry Rohter, *Abortion Foe Kills Doctor Outside of Clinic in Florida*, DALLAS MORNING NEWS, Mar. 11, 1993, at 1A; Dr. Tony Smith, *Health: Second Opinion*, INDEPENDENT (London), Dec. 5, 1993, at 85.

Abortion is becoming more difficult for American women. . . . Clinics are shutting because they are being bombed, picketed, blockaded, and burnt. According to the *Lancet*, up to the end of September 1993 there had been 1,417 acts of violence against family planning and abortion clinics and their staff—including 36 bombings, 289 bomb threats, 149 death threats and two kidnappings.

Id.

⁸³ 18 U.S.C. § 248(a)(1) (2001). FACE also prohibits the intentional damage or destruction of a reproductive health facility. § 248(a)(3). Criminal and civil penalties and relief resulting from violations include imprisonment, monetary damages, and injunctive relief where appropriate. § 248(b), (c).

⁸⁴ See, e.g., *Wilson*, 154 F.3d at 662 (noting that pro-life activists who physically blockaded an abortion clinic in violation of FACE argued that the Act "restricts their freedom of expression and imposes an impermissible viewpoint based restriction on speech"); *United States v. Dinwiddie*, 76 F.3d 913, 917, 921 (8th Cir. 1996) (stating that an anti-abortion activist who shouted through a bullhorn at an abortion doctor, "remember Dr. Gunn [a physician who

generally rejected them, deciding instead that FACE regulates speech that is not constitutionally protected and that the Act is a content and viewpoint-neutral statute.⁸⁵ Thus, while pro-life activists may not use force, threaten to use force, or physically block reproductive health clinic entrances, they still may express their views by peacefully picketing around centers that offer abortion, and may engage in nonviolent "sidewalk counseling" to discourage pregnant women from obtaining abortions.⁸⁶

In addition to sidewalks and areas surrounding an abortion clinic, *Planned Parenthood v. American Coalition of Life Activists*⁸⁷ demonstrated how the Internet has also been a source of free speech debate regarding abortion in the last few years. In that case, Planned Parenthood sued the American Coalition of Life Activists organization ("ACLA"), in part, for displaying on ACLA's website

was killed in 1993 by an opponent of abortion],” argued that FACE imposed “an impermissible content-based restriction on speech, and that it is vague and overbroad”); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1426–27 (S.D. Cal. 1994) (noting that a pro-life organization sought to enjoin the enactment of FACE because the Act restricted the freedom of expression and association protected by the First Amendment because it “singles out for special punishment acts committed in the course of anti-abortion protests”).

⁸⁵ See, e.g., *Wilson*, 154 F.3d at 662–63 (finding that use of force, threat of use of force, and physical obstruction are not protected speech and that the Act is viewpoint neutral because it “punishes anyone who engages in the prohibited conduct, irrespective of the person’s viewpoint and does not target any message based on content”); *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997) (stating that the regulation of “speech that amounts to a threat of force that obstructs, injures, intimidates, or interferes with the provider or recipient of reproductive health care” does not violate the First Amendment); *Dinwiddie*, 76 F.3d at 922–23. The *Dinwiddie* court concluded that threats of force were not protected speech and that FACE is not a content-based statute because it does not discriminate against speech or conduct that expresses an abortion-related message. “Thus, FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, ‘We are underpaid!’ rather than ‘Abortion is wrong!’ ” *Id.*; see also *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 648–50 (4th Cir. 1995) (concluding that the use of force or violence is not protected by the First Amendment); *Council for Life Coalition*, 856 F. Supp. at 1427 (determining that the Act applies to “any person” who engages in the prohibited conduct, not just pro-life activists, and that Congress enacted FACE to forbid violent conduct rather than to curb an anti-abortion message).

⁸⁶ *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 773–74 (1994) (finding that a 300-foot buffer zone around a clinic to prevent all uninvited approaches by pro-choice advocates, even peaceful approaches, burdened free speech rights and was thus unconstitutional); *Am. Life League, Inc.*, 47 F.3d at 650 (noting that FACE does not prohibit peaceful protests); Lyle Denniston, *Judges May Keep Protests from Blocking Abortion Clinics*, *Supreme Court Rules*, BALTIMORE SUN, July 1, 1994, at 3A (labeling the ability of pro-life activists to approach pregnant women as “sidewalk counseling” by reporting that *Madsen* “indicated that judges may not stop abortion foes from engaging in nonthreatening ‘sidewalk counseling’ fairly close to clinics, if that does not keep patients from entering or leaving clinics”).

⁸⁷ 23 F. Supp. 2d 1182 (D. Or. 1998).

information known as the “Nuremberg Files.”⁸⁸ The files contained personal identifying information of doctors who performed abortions and photographs of the doctors, as well as inflammatory language comparing the doctors to World War II Nazi war criminals.⁸⁹ In alleging violations under FACE and federal and state racketeering statutes,⁹⁰ Planned Parenthood claimed that the First Amendment did not shelter ACLA’s statements because they constituted “true threats.”⁹¹ Ultimately, on May 16, 2002, the Ninth Circuit held that several of ACLA’s acts constituted “a true threat.”⁹² Finding that ACLA knew that the physicians would find a serious threat in the “wanted” posters, the Court concluded that censoring these posters did not violate the First Amendment:

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE. Holding ACLA accountable for this conduct does not impinge on legitimate protest or advocacy. Restraining it from continuing to threaten these physicians burdens speech no more than necessary.⁹³

⁸⁸ *Id.* at 1187–88.

⁸⁹ *Id.* (stating that the web page contained statements such as the following: ACLA “is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity”; that “[t]here certainly must be a special place in hell for such unrepentant slaughterers of God’s children”). Furthermore, the court noted that “the [web] page bears drawings of what appear to be lines of dripping blood.” *Id.* at 1188.

⁹⁰ *Id.* at 1184.

⁹¹ *Id.* at 1189–90 (summarizing that defendants argued that the Internet statements were not true threats because they were facially non-threatening, while the plaintiffs urged that the statements be examined under the objective speaker-based test that considered the statements in light of the entire factual context, that is, the atmosphere of abortion violence). The district court determined that, in the context in which the statements were made, the Internet statements were actionable and not protected free speech. *Id.* at 1193–94; *Planned Parenthood v. ACLA*, 41 F. Supp. 2d 1130, 1155–56 (D. Or. 1999) (issuing a permanent injunction against ACLA from displaying the information on the Internet). The Ninth Circuit Court of Appeals, however, held that ACLA’s speech was protected and reversed the lower court holding. *Planned Parenthood v. ACLA*, 244 F.3d 1007, 1019–20 (9th Cir. 2000). The court also reversed a \$107 million jury verdict against the defendants. *Id.* Crucial to the Court of Appeals’ decision was that the statements were made in a public forum, that ACLA did not communicate privately with the plaintiffs, and that it did not say anything about harming the doctors, nor called upon others to do so. *Id.*

⁹² *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1088 (9th Cir. 2002) (stating that the court was satisfied that use of several posters and “the individual plaintiffs’ listing in the Nuremberg Files constitute a true threat. In three prior incidents, a ‘wanted’-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on the poster was killed.”).

⁹³ *Id.*

B. The Free Speech Debate in the Pro-Life License Plate Context

1. License Plates Are a Type of Speech

Because automobile license plates constitute “speech,” First Amendment free speech considerations apply to them.⁹⁴ Moreover, while a state may technically own the physical license plates,⁹⁵ courts treat plates as both state speech and private speech, applying a First Amendment analysis.⁹⁶

⁹⁴ The Supreme Court has assumed automobile license plates do constitute speech. Nearly twenty-five years ago, for example, the Court did not hesitate to apply First Amendment free speech consideration to a dispute regarding the required display of a state motto on automobile license plates. *Wooley v. Maynard*, 430 U.S. 705, 713–15 (1977) (presuming the message on the license plate was speech by commencing its analysis of the motto with the proposition that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all”). Subsequent to *Wooley*, lower courts have also presumed messages on automobile license plates are a type of speech and applied First Amendment free speech doctrine accordingly. *See, e.g., Lewis v. Wilson*, 253 F.3d 1077, 1079–82 (8th Cir. 2001); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1101–05 (D. Md. 1997); *Pruitt v. Wilder*, 840 F. Supp. 414, 417–18 (E.D. Va. 1994). Moreover, because specialty license plates are a smaller category under the larger umbrella of automobile license plates, specialty tags are also speech included under the First Amendment. *See also* Jack Achiezer Guggenheim & Jed M. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 580 (2000) (“Specialty plates constitute speech because the plate contains the extra dimension of an organization name and a symbolic logo.”).

⁹⁵ Most states expressly provide that an automobile license plate is state property or that a license plate may only be issued by the state department of motor vehicles. *See, e.g., KAN. STAT. ANN. § 8-132(a)* (2000) (“[T]he division of vehicles shall furnish to every owner whose vehicle shall be registered one license plate for such vehicle.”); *MICH. COMP. LAWS § 257.259(a)* (2001) (“All license plates. . . shall be deemed to be the property of the state of Michigan . . .”); *NEB. REV. STAT. § 60-311(1)* (2001) (“The Department of Motor Vehicles shall furnish to every person whose motor vehicle is registered fully reflectorized license plates . . .”); *N.C. GEN. STAT. § 20-63(a)* (2000) (“Registration plates issued by the Division under this Article shall be and remain the property of the State . . .”); *N.D. CENT. CODE § 39-04-11* (2001) (“All vehicle license plates issued by the department continue to be the property of the State of North Dakota for the period for which the plates are valid.”); *OR. REV. STAT. § 585.080(2)* (2000) (“All license plates. . . are at all times the property of the State of Oregon.”); *S.C. CODE ANN. § 56-3-1210* (Law. Co-op. 2001) (“[T]he Department, upon registering and licensing a vehicle, shall issue to the owner one license plate.”).

⁹⁶ *See, e.g., Henderson v. Stalder*, 112 F. Supp. 2d 589, 598 (E.D. La. 2000), *rev’d, vacated, and remanded by* 287 F.3d 374 (5th Cir. 2002) (noting that the State had taken the position that the pro-life message was its own); *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 943–44 (W.D. Va. 2001) (recognizing that there may be times a license plate will represent state speech); *see also* Jacobs, *supra* note 36, at 441–43 (discussing the ability of the government to “speak for itself” and the difficulty in determining whether speech is government speech or private speech); *infra* Section IV regarding the confusion presented by whether pro-life license plates appear to represent state speech.

2. *Hildreth v. Dickinson*⁹⁷

In early 1998, both houses of the Florida Legislature passed a bill to create a "Choose Life" license plate, with proceeds from the sale of the plates going to organizations advocating adoption as an alternative for unwanted pregnancies.⁹⁸ Although the Florida governor at the time, Lawton Chiles, subsequently vetoed that bill, the next governor, Jeb Bush, signed it into law after it passed through both houses again in 1999.⁹⁹

In response to this statute, pro-choice plaintiffs filed suit against the State, claiming that the pro-life license plate law violated the First Amendment's Freedom of Speech clause.¹⁰⁰ To establish this claim, plaintiffs first argued that Florida created a limited public forum by authorizing organizations to propose specialized license plates.¹⁰¹ Further, as a limited public forum, plaintiffs contended that the State could regulate the content displayed on license plates, but could not discriminate against certain viewpoints on that same subject.¹⁰² As a result, plaintiffs concluded, viewpoint discrimination resulted when the State permitted the pro-life viewpoint, but failed to offer a pro-choice perspective on a license plate.¹⁰³

According to the court, however, plaintiffs failed to follow the statutory framework to request their own pro-choice plate.¹⁰⁴ This failure to do so was

⁹⁷ No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503 (M.D. Fla. Dec. 22, 1999).

⁹⁸ Jacobs, *supra* note 36, at 427-28. State Senator Tom Lee sponsored this bill, which was originally the "brainchild" of County Commissioner Randy Harris. *Id.* Prior to the passage of this Florida bill, Harris founded Choose Life, Inc. to promote pro-life license plates. *Id.* at 427.

⁹⁹ *Id.* at 428. Governor Bush promised during his campaign that he would support such legislation if elected. *Id.* at 428. This bill creating the "Choose Life" specialty license plate was codified at section 320.08058(30) of the Florida code: "The department shall develop a Choose Life license plate as provided in this section. The word 'Florida' must appear at the bottom of the plate, and the words 'Choose Life' must appear at the top of the plate." FLA. STAT. ANN. § 320.08058(30)(a) (West 2001).

¹⁰⁰ *Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *7-8.

¹⁰¹ *Id.* at *8.

¹⁰² *Id.*

¹⁰³ *Id.* Although not expressly raised in *Hildreth*, Florida supporters of the "Choose Life" license plate have argued that the plate does not convey an anti-abortion message. Jacobs, *supra* note 36, at 429. Instead, the supporters insist, it is a pro-adoption plate that "'has nothing to do with a woman's right to choose an abortion.'" *Id.* This argument, however, is illusory for at least three reasons: (1) a more direct pro-adoption phrase, "Choose Adoption," was rejected several times by pro-life plate supporters; (2) anti-abortion groups such as Florida Right to Life actively support Choose Life, Inc., the impetus behind the pro-choice license plate movement; and (3) even pro-life defendants in a later, but similar, "Choose Life" lawsuit fairly conceded that the plate was not viewpoint neutral on the abortion debate (that is, not merely an adoption issue). See *id.*; *Henderson v. Stalder*, 112 F. Supp. 2d 589, 598 (E.D. La. 2000).

¹⁰⁴ *Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *16.

fatal, making their claim unripe for judicial determination.¹⁰⁵ Moreover, plaintiffs did not establish how the statutory framework prevented them from speaking or punished them for speaking.¹⁰⁶ They could have applied for their own plate and were not compelled in any way to purchase the "Choose Life" plate and endorse a view they opposed.¹⁰⁷ Accordingly, the court determined that the plaintiffs lacked standing because they did not demonstrate an actual or imminent injury.¹⁰⁸ Because the plaintiffs failed to present a justiciable case or controversy, their motions were denied both to declare the "Choose Life" plate statute unconstitutional and for an injunction to halt production of the plates.¹⁰⁹

3. *Henderson v. Stalder*¹¹⁰

Nearly a year after *Hildreth*, pro-choice plaintiffs in Louisiana mounted a similar free speech argument against a "Choose Life" license plate statute,¹¹¹ but were initially more successful than their Florida counterparts.¹¹² In *Henderson*, the plaintiffs maintained that the statute unconstitutionally discriminated on the basis of viewpoint by permitting only "the pro-life viewpoint to be expressed via special license plates and pro-choice car owners are not given the option of expressing their view on their license plate."¹¹³

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *20. According to the court, Chapter 99-301, the chapter covering applications for specialty license plates, "does not limit or regulate speech in any way . . . [It] grants an opportunity for speech, but does not regulate it." *Id.* at *19.

¹⁰⁷ *Id.* at *20.

¹⁰⁸ *Id.* at *18-19, 21.

¹⁰⁹ *Id.* at *21. Following this result in the Florida District Court, the National Right to Life Committee, which supported the pro-life license plate movement started by Choose Life, Inc., posted on their website this message: "We can really start spreading the word about the 'Choose Life' license plates. We only have 46 more states to go." Lerner, *supra* note 1, at 48.

¹¹⁰ 112 F. Supp. 2d 589 (E.D. La. 2000), *rev'd, vacated, and remanded by* 287 F.3d 374 (5th Cir. 2002), *vacated by, rehearing en banc denied by* 2003 U.S. App. LEXIS 930 (5th Cir. Jan. 9, 2003), *cert denied*, 123 S. Ct. 602 (2002).

¹¹¹ The "Choose Life" license plate statute plaintiffs challenged was section 47:463.61 of the Louisiana code. The statute provides that: "The license plate shall be of a color and design selected by the Choose Life Advisory Council provided it is in compliance with R.S. 47:463(A)(3), and shall bear the legend 'Choose Life.'" LA. REV. STAT. ANN. § 463.61(A) (West 2001). Both houses of the Louisiana legislature passed this bill unanimously. Jacobs, *supra* note 36, at 432.

¹¹² The Louisiana plaintiffs also argued, unsuccessfully, that the pro-life license plates violated the Establishment Clause. *Henderson*, 112 F. Supp. 2d at 593-95; *see supra* Part II.B.1.

¹¹³ *Henderson*, 112 F. Supp. 2d at 595.

The *Henderson* defendants¹¹⁴ responded with three main arguments. First, the defendants characterized the pro-life license plate as the State's own speech, thus not constituting a forum under the First Amendment.¹¹⁵ Next, as the Florida defendants successfully alleged, because the pro-choice plaintiffs failed to apply for their own plate, the dispute was not ripe.¹¹⁶ Finally, the defendants asserted that no statute prohibited the plaintiffs' pro-choice speech, again relying on a winning *Hildreth* argument.¹¹⁷

After observing that most of the other sixty or so specialty plates did not appear to be controversial,¹¹⁸ the court noted that, regardless of the type of forum created by the plates,¹¹⁹ governmental regulation of the speech must be viewpoint neutral.¹²⁰ The need for viewpoint neutrality was particularly important in the context of these pro-life license plates when the State adopted one viewpoint as its own because "[t]he right to an abortion is an extremely controversial issue and is

¹¹⁴ The *Henderson* defendants included the Secretary for the Department of Public Safety and Corrections and the State Treasurer. *Id.* at 591.

¹¹⁵ *Id.* at 595. In addition, the State contended that it was permitted to express a preference for normal childbirth over abortion. *Id.* By adopting this viewpoint as its own, the State "has chosen license plates as a forum for speech. Once it makes this choice it cannot discriminate against another viewpoint." *Id.* at 598. Indeed, the court later concluded that pro-choice plaintiffs should not have to wait to express their views in this forum, "particularly in light of the State's pointed espousal of the published opinion to 'Choose Life.'" *Id.* at 601.

¹¹⁶ *Id.* at 595.

¹¹⁷ *Id.* at 595-96.

¹¹⁸ *Id.* at 596. Types of available Louisiana specialty license plates include college and university license plates, Girl Scouts, and "Don't Litter Louisiana." *Id.* "[F]or the most part the organizations represented do not appear to be controversial." *Id.*

¹¹⁹ *Henderson*, 112 F. Supp. 2d at 597-600. The court stated that because plaintiffs had assumed that the plates constituted a nonpublic forum for purposes of the preliminary injunction, the court would analyze it as such. *Id.* at 597.

The designation of the nature of the forum may sometimes be significant. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-45 (1983). Typically, property is separated into three different kinds of forums under a First Amendment analysis: the traditional public forum, the designated public forum, and the non-public forum. *See, e.g.*, *Perry Ed. Ass'n*, 460 U.S. at 45-46; *Comelius v. NAACP*, 473 U.S. 788, 802 (1985); *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 947-48 (W.D. Va. 2001). The first category, the traditional public forum, generally includes streets and parks as areas that "'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Ed. Ass'n*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). The second category, the designated public forum or limited public forum, is "public property which the State has opened for use by the public as a place for expressive activity." *Id.* Finally, a non-public forum includes other government property that has not been qualified as a public forum by either tradition or designation. *Id.* at 46; *Holcomb*, 129 F. Supp. 2d at 947.

¹²⁰ *Henderson*, 112 F. Supp. 2d at 598. For a discussion of the meaning of viewpoint neutrality, see *supra* note 72 and accompanying text.

the focus of a national debate.”¹²¹ On such a polemical issue, the court concluded, it would probably unconstitutionally restrain free speech to provide through legislation only one viewpoint.¹²² This remained true even though the State did not prohibit plaintiffs from creating their own plate.¹²³ Indeed, “the very fact that the defendants insist that this is a state ‘message’ will probably require the Court to find” the statute unconstitutional upon trial of the merits.¹²⁴

Next, the court rejected defendants’ argument that plaintiffs were not compelled to use a “Choose Life” plate when sixty other specialty plates were available because this theory did not acknowledge that the State had already adopted the pro-life message as its own.¹²⁵ It was enough, the court concluded, that the plaintiffs were not legislatively authorized to use the license plate forum for their pro-choice views and that only one point of view, the State’s, existed in that forum.¹²⁶ In denying defendants’ standing argument, the court maintained that “[o]nce a forum has been created which allows viewpoint discrimination, it is unconstitutional from the moment the discriminatory forum is created.”¹²⁷

Finally, in determining whether to grant the injunction preventing production of the “Choose Life” plates, the court found that the threatened constraint on free speech “far outweighs the damage that would be imposed by not allowing the publication of the license plates.”¹²⁸ As a result, the district court enjoined production of the pro-life plates in August 2000, with the pro-choice plaintiffs succeeding where their Florida counter-parts had failed the previous year.¹²⁹

¹²¹ *Henderson*, 112 F. Supp. 2d at 598.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* The court also noted that there were generally three restrictions on government speech: (1) the government may not grant access to public forums to those whose ideas it favors and deny access to others; (2) it may not “monopolize the ‘marketplace of ideas’,” obscuring private speech; and (3) it may not “compel persons to support candidates, parties ideologies [sic] or causes they are against.” *Id.* at 599 (citations omitted).

¹²⁵ *Id.*

¹²⁶ *Id.* 599–600.

¹²⁷ *Henderson*, 112 F. Supp. 2d at 601.

¹²⁸ *Id.* at 602.

¹²⁹ *Id.* Louisiana may be the first state to recognize plaintiffs’ viewpoint discrimination argument against the “Choose Life” plates, but it may not be the last one to do so. Last September, a pro-choice plaintiff (Planned Parenthood) in South Carolina filed suit alleging, among other things, that the pro-life license plate statute impermissibly discriminated against its pro-choice views. Amended Complaint para. 25, *Planned Parenthood v. Rose* (D.S.C. filed Sept. 21, 2001) (No. 2-01-3571-23). Subsequently, in November 2001, a judge issued a preliminary injunction barring the manufacturing and production of the “Choose Life” plates until a decision on the merits is issued. Order at 6–7, *Rose* (D.S.C. filed Nov. 20, 2001) (No. 2-01-3571-23). In deciding to grant this injunction, the court determined that if plaintiffs “are ultimately successful on the merits, the failure to grant a preliminary injunction would have worked an irreparable harm to Plaintiffs as they would have been unable to exercise their First

On March 29, 2002, however, the Fifth Circuit reversed the district court's holding, finding that the pro-choice plaintiffs lacked standing to challenge the constitutionality of the "Choose Life" plate statute.¹³⁰ According to the Fifth Circuit, plaintiffs failed to establish standing under any of the following bases: taxpayer standing,¹³¹ individual standing,¹³² and organizational standing.¹³³ First, the court rejected the individual plaintiff's argument that there was no similar pro-choice plate to express her views on her car.¹³⁴ In denying plaintiff's argument, the court noted that plaintiff's requested relief, a declaratory judgment that the "Choose Life" statute was unconstitutional, would not redress her complained of injury.¹³⁵ As a result, no individual standing existed.¹³⁶

4. Women's Emergency Network v. Dickinson¹³⁷

The court deployed similar reasoning in *Women's Emergency Network* and also determined that plaintiffs lacked standing to challenge the "Choose Life" statute.¹³⁸ First, the court rejected the organization's claim that it was forced to choose "between speech about abortion and eligibility to receive funds under the

Amendment right to express their pro-choice position on their vehicle license plates." *Id.* at 4–5. The court further maintained that the pro-life defendants, on the other hand, would not suffer any injury from the injunction. *Id.* at 5. In balancing these harms, the court concluded that the injunction must be granted. *Id.* at 6–7. A decision on the merits of this case has not yet been issued, but the order granting the injunction did refer to *Henderson* when considering free speech injury, indicating perhaps an inclination or willingness to follow that decision in favor of the pro-choice plaintiffs. *Id.* at 4.

¹³⁰ *Henderson v. Stalder*, 287 F.3d 374, 382 (5th Cir. 2002).

¹³¹ *Id.* at 379–81; see also *infra* Part II.B.1. (discussing the court's use of this basis as a rejection of the Establishment Clause challenge).

¹³² *Id.* 381.

¹³³ *Id.* at 381–82.

¹³⁴ *Id.* at 381.

¹³⁵ *Id.* A forceful dissent in another case, however, relied on a line of Supreme Court cases that held that an excluded person or group had standing to challenge an under-inclusive statute. *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564, 568 (D.S.C. 2002) (citing *Henderson II*). For more discussion, see *infra* Part IV.B.

¹³⁶ The court rejected organizational standing on the same basis, that granting the requested relief (declaring the statute unconstitutional) would not address the injury complained of by Planned Parenthood that it was ineligible for funds through the Choose Life Fund. *Henderson*, 287 F.3d at 381–82.

¹³⁷ 214 F. Supp. 2d 1308 (S.D. Fla. 2002).

¹³⁸ *Id.* at 1313–15. Indeed, the court in *Women's Emergency Network* noted that the statutory schemes in Florida and Louisiana were similar, making "the *Henderson* analysis . . . highly persuasive for purposes of this [standing] discussion." *Id.* at 1313, n.3. The court's analysis of taxpayer standing is not addressed here because it was addressed earlier in this note under the Establishment Clause challenges. See *infra* Part II.B.2.

Act.”¹³⁹ Because the court concluded that the statute did not prevent anyone from speaking, and that plaintiff organization did not apply for its own pro-choice plate, Women’s Emergency Network could not demonstrate an injury in fact.¹⁴⁰ In addition, the court noted that even a favorable outcome would not provide the organization with the opportunity to speak on this issue.¹⁴¹ Consequently, Women’s Emergency Network lacked standing as an organization to challenge the “Choose Life” statute.¹⁴² The court further rejected the individual plaintiffs’ argument that they were injured because they were unable to purchase a pro-choice plate to express their view on abortion.¹⁴³

IV. STATES CANNOT AUTHORIZE THE “CHOOSE LIFE” SLOGAN ON AUTOMOBILE LICENSE PLATES

A. Pro-Life License Plates Are Unconstitutional Under the Establishment Clause

1. “Choose Life” Is Not “Secularized” Religious Speech and Therefore Violates the Establishment Clause

Both the Florida state court’s decision dismissing NOW’s challenge¹⁴⁴ and South Carolina’s Attorney General Charlie Condon¹⁴⁵ maintain that the words “Choose Life” on automobile license plates do not violate the Establishment Clause. This position, however, cannot withstand close scrutiny.

The phrase “Choose Life” is a Christian religious phrase,¹⁴⁶ clearly taken directly from the Bible and is a founding precept in many Christian religions—

¹³⁹ 214 F. Supp. 2d at 1313.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* In reaching this determination, the court relied heavily on *Henderson*. *Id.*

¹⁴³ *Women’s Emergency Network*, 214 F. Supp. 2d at 1315.

¹⁴⁴ See *supra* Part II.C.

¹⁴⁵ For Attorney General Condon’s statements see, for example, *Group Opposes “Choose Life” Plates*, *supra* note 12; Bruce Smith, *Planned Parenthood Challenges State’s New “Choose Life” License Plates*, STATE (Columbia), Sept. 4, 2001, at 1; *Lawsuit Challenges S.C. “Choose Life” Tags*, UPI, Sept. 4, 2001, LEXIS, News Library, Wire Service Stories File.

¹⁴⁶ The phrase “Choose Life” is a direct religious quotation from the Bible’s book of Deuteronomy. See *supra* note 72. “Surely the place of the Bible as an instrument of religion cannot be gainsaid . . .” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 (1963). Phrases drawn from a Christian text “demonstrate a particular affinity toward Christianity.” *ACLU v. Capitol Square Review & Advisory Bd.*, 210 F.3d 703, 727 (6th Cir. 2000); see also Verginis, *supra* note 25, at 764.

In addition, the religious phrase “Choose Life” has been consistently associated with the pro-life movement. Cf. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 787 (1994) (Scalia,

such as the Roman Catholic Church and the Baptist Church—that base the right to life on Bible scripture.¹⁴⁷ Attorney General Condon compared the right to display this religious phrase “Choose Life” on a license plate to the government’s right to use religious phrases in other venues: “Just as the federal government can constitutionally place the message ‘In God We Trust’ on its currency, the state of South Carolina can place the message ‘Choose Life’ on its license plates.”¹⁴⁸ The United States Supreme Court, however, already considered this alleged comparison between the physical placement of religious statements on currency and automobile license plates and rejected the proposition that there is any similarity concerning the two.¹⁴⁹ In particular, the Court noted that the religious

J., concurring in part and dissenting in part) (“On placards held by [abortion clinic] picketers and by stationary protesters . . . the following slogans are visible . . . ‘Choose Life: Abortion Kills.’ ”); *Children of the Rosary v. Phoenix*, 154 F.3d 972, 975 (9th Cir. 1998) (involving a pro life organization’s proposed advertisement that included “CHOOSE LIFE!”); *Planned Parenthood v. Bell*, 677 N.E.2d 204, 212 (Mass. 1997) (affirming an injunction against an abortion clinic protester who wore the phrase “Choose Life” on her clothing during picketing); *Columbus v. Bricker*, 723 N.E.2d 592, 593 (Ohio Ct. App. 1998) (noting that pro-life defendant charged with violating a city ordinance constructed a “Choose Life” sign outside an abortion clinic).

¹⁴⁷ See, e.g., Letter of Pope John Paul II to All the World’s Bishops on Combatting Abortion and Euthanasia (May 19, 1991), <http://www.cin.org/jp2ency/aboreuth.html> (last visited May 24, 2003). The Pope, the leader of the Roman Catholic Church, advised his bishops:

[I]t seems more urgent than ever that we should forcefully reaffirm our common teaching, based on sacred Scripture and tradition, with regard to the inviolability of innocent human life. . . . The church intends not only to reaffirm the right to life—the violation of which is an offense against the human person and against God the Creator and Father, the loving source of all life—but she also intends to devote herself ever more fully to concrete defense and promotion of this right.

Id.; see also Pastor Art Kohl, *Abortion: Perhaps the Most Selfish Sin!?!* , Faith Bible Baptist Church, at <http://www.fbcb.com/messages/Abortionisselfish.htm> (last visited May 24, 2003). Kohl, a Baptist pastor, wrote:

According to God’s Word, the Bible, life begins BEFORE conception. Most argue today whether it starts at conception or AFTER. The Bible says BEFORE! The Lord told Jeremiah, “*Before I formed thee in the belly, I KNEW THEE: and before thou camest forth out of the womb I sanctified thee, and I ordained thee a prophet unto the nations*”. . . . Six times in the book of Revelation it speaks of the Lord’s “Book of Life.” The names of those written in that book were written BEFORE the foundation of the world! Not after their physical birth, but before creation!

Id.

¹⁴⁸ Smith, *supra* note 145, at 1.

¹⁴⁹ *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977):

It has been suggested that today’s holding [that a state may not require its citizens to display the state motto on their vehicle license plates] will be read as sanctioning the obliteration of the national motto, “In God We Trust” from United States coins and

phrase on currency is not on display to the public, unlike an automobile license plate.¹⁵⁰

In addition to diverse locations of placement, the "Choose Life" slogan is significantly different from other more recognizable religious phrases such as "In God We Trust," "one nation, under God," and "God Save the United States and this Honorable Court."¹⁵¹ Unlike "Choose Life," the latter well-known phrases are "deeply embedded in various aspects of public life."¹⁵² The Supreme Court has upheld the legitimacy of these "deeply embedded" historical phrases through a "secularization" approach.¹⁵³ This method relies on "the proposition that

currency . . . [W]e note that currency, which is passed from hand to hand, differs in significant respect from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public.

Id.

¹⁵⁰ *Id.*

¹⁵¹ Bell, *supra* note 24, at 1273 n.1 (noting these famous religious phrases and that "the Supreme Court's sessions begin only after the Marshal has recited the opening chant containing the language 'God Save the United States and this Honorable Court' ") (quoting LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE*, at xiv (University of North Carolina 2d ed. 1994)). *But see* *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *stay granted* by 2002 U.S. App. LEXIS 12826 (finding that the words "under God" failed the endorsement test, the coercion test, and part of the *Lemon* test, thus violating the Establishment Clause).

¹⁵² Bell, *supra* note 24, at 1276. For a brief discussion that the pro-life movement (represented by the phrase "Choose Life") is not "deeply embedded in public life" because it is a relatively new concept, see *supra* note 127 and accompanying text.

¹⁵³ Bell, *supra* note 24, 1292, 1298-307 (maintaining that historical religious expressions, such as "God save this honorable Court," "In God We Trust," and "One Nation under God," are validated through the secularization rationale and without that rationale, the phrases would violate the Establishment Clause under *Lemon*). "Secularization" asks "whether seemingly religious practices and symbols are in fact religious, or whether history and collective experience have purged them of their religious significance." Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579, 579 (1998). If the religious symbols are in fact "purged . . . of their religious significance," secularization then "preserves the inclusion of symbols and practices that many Americans understand as fundamental to American identity," such as the Pledge of Allegiance and other national mottos. *Id.* at 579-80. For cases demonstrating the Supreme Court's use of secularization, see, for example, *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (noting that "In God We Trust" and the Pledge of Allegiance are permissible religious references); and *Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989) (distinguishing the Pledge of Allegiance from other unconstitutional religious symbols).

While the use of secularization to validate religious symbols and phrases has been heavily criticized, it is still employed by courts, as noted above. *See, e.g.*, Bell, *supra* note 24, at 1305 (criticizing secularization for its inconsistent results and for its "disservice to both religion and society"); Furth, *supra*, at 600 (noting that secularization "threatens the integrity of both religion and government, and ultimately marginalizes nonadherents").

religiousness is a contextual label” where “history, time, and culture somehow diminish or erase the religious import” of the religious symbol or phrase.¹⁵⁴

Unlike the familiar national phrases such as “In God We Trust,” “Choose Life,” as a Christian religious symbol of the pro-life movement, is not void of religious import and is not “fundamental to American identity.”¹⁵⁵ Without secularization, the religious phrase “Choose Life” fails.¹⁵⁶ Because the Court did not similarly secularize the phrase “Choose Life,”¹⁵⁷ it consequently violates the Establishment Clause.¹⁵⁸

¹⁵⁴ Furth, *supra* note 153, at 593. Justice Brennan’s belief, too, apparently coincided with this interpretation of secularization, and that religious phrases could lose their religious significance over time and through repetition. *Lynch*, 465 U.S. at 716 (1984) (Brennan, J., dissenting). He also noted that the familiar historical religious phrases such as “In God We Trust” are “uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to some national challenge.” *Id.* at 717. Conversely, the phrase “Choose Life” does not serve a secular purpose, but rather advances a religious viewpoint.

¹⁵⁵ Again, under secularization, the Supreme Court examines the tradition and use of a phrase or symbol rather than the “‘content of its meaning.’” Bell, *supra* note 24, at 1294 (quoting Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 50 (1993)). Even if the content of the phrase “Choose Life” were examined, however, it would still fail the tradition test. Justice Blackmun, in recognizing a woman’s right to choose an abortion, noted that anti-abortion laws (and thus the pro-life movement and its “Choose Life” symbol) were not longstanding, and thus not fundamental, in the United States: “It perhaps is not generally appreciated that the restrictive criminal abortion laws [i.e., pro-life sentiment] in effect in a majority of States . . . [in 1973] are of relatively recent vintage.” *Roe v. Wade*, 410 U.S. 113, 129 (1973). Indeed, he further observed that the pro-life movement (signified by the “Choose Life” symbol) was not even a significant part of American common law: “It is thus apparent that at common law, at the time of adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes [in effect in 1973].” *Id.* at 140.

¹⁵⁶ “In the absence of secularization, historical religious expressions would violate the *Lemon* test, O’Connor’s endorsement test, and Kennedy’s coercion test.” Bell, *supra* note 24, at 1298. See *infra* Part IV.3 for discussion of these latter two tests.

¹⁵⁷ Of course, the pro-life movement could have chosen a different, non-religious phrase, such as “Choose Adoption,” to represent its cause that would not have run into this particular Establishment Clause problem, but it refused to do so. See, e.g., Jacobs, *supra* note 36, at 429 (noting that “amendments to change the wording to ‘Choose Adoption’ were defeated several times in the [Florida] legislature”); Alan Judd, “Choose Life” Slogan Endorsed for Tag, LEDGER (Lakeland, Fla.), Mar. 18, 1999, at B7 (“Critics tried, but failed, to get the Transportation Committee [in Florida] to change the slogan on the tag to ‘Adopt a Child.’”); Othon, *supra* note 69 (“NOW Vice President Shiela Jaffe said the organization tried to get the [Florida] Legislature to change the wording of the phrase to ‘Choose Adoption,’ but it was rejected.”).

¹⁵⁸ Cf. Bell, *supra* note 24, at 1298–302 (demonstrating how secularization is necessary to preserve religious phrases).

2. Henderson I's ¹⁵⁹*Flaw: Leaving the Door Open for Future Lemon Establishment Clause Challenges, Based on Distribution, to Succeed*

a. Henderson I's Reasoning Does Not Rest on a Sound Basis and Is Vulnerable to Attack

Although the *Henderson*¹⁶⁰ court maintained that the pro-life license plate state statute served a valid secular purpose under *Lemon*,¹⁶¹ the court's reliance on the Supreme Court precedent of *Bowen v. Kendrick*¹⁶² to justify this conclusion is misplaced. In *Bowen*, the disputed statute, the Adolescent Family Life Act ("AFLA"), provided funds to organizations researching and providing services dealing with pre-marital adolescent pregnancy and sexual activity.¹⁶³ Indeed, the *Bowen* opinion itself emphasized, through citing extensive legislative history and statutory language, that AFLA was aimed at teenagers and the special problems related to teen sexuality and parent involvement.¹⁶⁴ The *Bowen* court, therefore, obviously did not include in its analysis adult women dealing with unintended pregnancies and consequently could not have articulated that statutes dealing with adult women and pregnancy served a valid secular purpose.

Thus, the *Henderson* court, by failing to distinguish adult women and adolescents, presumed that there was no distinction between the special needs and problems facing sexually active teens and adult women.¹⁶⁵ This presumption, that

¹⁵⁹ "*Henderson I*" refers to the district court's first decision at 112 F. Supp. 2d 589 (E.D. La. 2000). Although the later decision at 287 F.3d 374 (5th Cir. 2002) also rejected Establishment Clause arguments as well as Free Speech arguments, the Fifth Circuit denied those claims based on lack of standing. *Id.* at 379-82. *Henderson I*'s analysis is addressed here because other courts in future decisions may examine challenges yet to come in a similar manner.

¹⁶⁰ 112 F. Supp. 2d 589 (E.D. La. 2000).

¹⁶¹ *Id.* at 593-94.

¹⁶² 487 U.S. 589 (1988). The *Henderson* court relied on *Bowen* to establish that the funds generated from the pro-life license plates served a secular purpose, solving the dilemma of unwanted pregnancies. *Henderson*, 112 F. Supp. at 594.

¹⁶³ *Bowen*, 487 U.S. at 593.

¹⁶⁴ See, e.g., *id.* at 595 (noting that Congress was cognizant of "the problems of adolescent premarital sexual relations, pregnancy, and parenthood"); *id.* at 596 (stating that AFLA "should promote the involvement of parents"); *id.* at 597 n.3 (finding that AFLA may only refer to abortion services "to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral"); *id.* at 598 ("AFLA has a valid secular purpose: the prevention of social and economic injury caused by teenage pregnancy and premarital sexual relations.") (emphasis added).

¹⁶⁵ Organizations that advise the public on sexual health matters, such as Planned Parenthood, recognize that teenagers face different issues and dilemmas about their sexuality and sexual behavior, such as peer pressure, than adults do. Planned Parenthood, for example, provides special advice and information for teenagers grappling with sexual issues, particularly

minors and adults are similarly situated, is contrary to decades of Supreme Court jurisprudence.¹⁶⁶ This distinction is critical because, while addressing teen

peer pressure from other teens to have sex in order to be popular or fit in: "It may seem as though everyone your age is having sex—especially intercourse. This can make you feel that you should be, too." Teens: Sexual Health Series—How Do You Know When You're Ready for Sex?, Planned Parenthood, at www.plannedparenthood.org/teens/ready4sex.html (last visited May 24, 2003). In addition, the website presents parents with a guide on how to talk to their teenage children about these unique pressures and dilemmas: "Many kids become confused and may be pressured into sexual intercourse before they are ready. Too often sexual abuse, sexually transmitted infections, and unwanted pregnancy shape their lives. . . . Often afraid of being 'different,' teens are easy targets for peer pressure and bad advice." Teen: The Facts of Life—A Guide for Teens and Their Families, Planned Parenthood, at <http://www.plannedparenthood.org/teens/teentalk4.html> (last visited May 24, 2003).

Moreover, even more conservative pro-life organizations recognize that teen sexuality is a different issue than adult sexuality. Cf. *Homepage, Ariz. Right to Life*, at <http://www.azrtl.org> (last visited May 24, 2003) (linking to Arizona Right to Life organization that advocates targeting teens and youth groups to teach abstinence); <http://www.care-net.org/> (last visited May 24, 2002) (providing two separate links for women and teens regarding abortion).

¹⁶⁶ For Supreme Court cases illustrating the recognition that minors occupy a special place in the law and do not have the same capacity or maturity as adults, see, for example, *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (" 'Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. . . . [A]dolescents may have less capacity to control their conduct and to think in long-range terms than adults.' ") (quoting the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders); *Tison v. Arizona*, 481 U.S. 137, 171 n.10 (1987) ("[W]e decline to hold a young child as morally and criminally responsible for an illegal act as we would hold an adult who committed the same act. . . . [T]he child's actions are presumed not to reflect a mature capacity for choice . . ."); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. [These laws recognize] that . . . minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); *Carey v. Population Services International*, 431 U.S. 678, 709–710 (1977) (White, J., concurring) (observing that, because minors face different and increased risks resulting from early sexual activity than adults do, distinct considerations and restrictions should apply to the distribution of contraception to minors); and *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) ("[A]t least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.").

Finally, the Supreme Court has explicitly recognized that this lower level of maturity and capacity in minors affects how to deal with unplanned pregnancies in adult women and teenage girls. For example, the Court noted that parental notification laws regarding teen abortion "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. *We cannot adopt a parallel assumption about adult women.*" *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (emphasis added).

sexuality and unplanned teen pregnancies may be a secular state purpose, the Court has not similarly deemed counseling adult women about their own sexuality. By failing to establish a valid secular purpose, the pro-life license plates fail under *Lemon*.

b. Future Plaintiffs May Succeed Under Different Factual Circumstances

Although the *Henderson* court refused to find an Establishment Clause violation, it did leave the opportunity open for future pro-choice plaintiffs to prevail under different factual circumstances. For example, the court concluded that the lack of evidence demonstrating that the three organizations in the council that help to distribute the license plate funds were religious organizations “cuts against the plaintiffs at this procedural stage of the proceedings.”¹⁶⁷ Plaintiffs are now on notice that they must thoroughly investigate and present evidence detailing the nature of the organizations involved, providing documentation such as who founded the group, who contributes financially to it to ensure its livelihood, whether key leaders are also religious leaders who have dominant control over the group, among other things.¹⁶⁸

3. The Survival of the Lemon Test is Very Unlikely and Pro-Choice Plaintiffs Will Prevail Under Other Analyses

While the pro-life plates would fail under the *Lemon* inquiry,¹⁶⁹ future pro-choice advocates would prevail, too, under an Establishment Clause attack, even if the Supreme Court decides to abandon the rigid and difficult-to-meet *Lemon* test altogether. This possibility is quite likely¹⁷⁰ given the frequent and consistent

¹⁶⁷ *Henderson*, 112 F. Supp. 2d at 595.

¹⁶⁸ In other words, if future plaintiffs could demonstrate that the organizations that help to decide which groups are eligible to receive the funds are actually religious in nature, plaintiffs' claims may survive. Indeed, ineligible pro-choice applicants have noticed the *Henderson* court's invitation to present different factual circumstances that might yield a different result than that in that case. In Florida, for example, The Women's Emergency Network and Emergency Medical Assistance, Inc., filed suit in January 2002, alleging that the state allowed religious organizations to distribute the funds, in violation of the Establishment Clause. See *supra* Part II.B.2; see also Gammon, *supra* note 15; *Lawsuit Challenges Choose Life Car Tags*, SUN-SENTINEL (Ft. Lauderdale), Jan. 16, 2002, at 3B.

¹⁶⁹ See *supra* Part IV.A.

¹⁷⁰ For articles observing the fierce criticism of *Lemon*, the Court's haphazard application of the test and its results, and suggestions for alternative Establishment Clause tests, see, for example, Bila, *supra* note 24, at 1550–54, 1581–96; Kristin M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 PAC. L.J. 121, 126–31, 157–61 (1995); Graham, *supra* note 24, at 182–85; Kagan, *supra* note 24, 634–35, 645–50; Kilroy, *supra* note 35, at 708–13, 737–43; Daniel Parish, Comment,

harsh criticism of *Lemon* by several former and current Supreme Court Justices.¹⁷¹ Indeed, a few of the Supreme Court Justices presently serving have formulated alternative tests to the one articulated in *Lemon*.¹⁷² Justice O'Connor, for example, maintained that the endorsement test "captures the fundamental requirement of the Establishment Clause."¹⁷³ Justice Kennedy, on the other hand,

Private Religious Displays in Public Fora, 61 U. CHI. L. REV. 253, 255–63 (1994); and Petron, *supra* note 34, at 1244–51 (2000).

¹⁷¹ See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment) ("Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) (noting the Court's repeated attempts to overturn *Lemon*); *Allegheny County v. ACLU*, 492 U.S. 573, 655–56 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (noting that the Court has frequently criticized the *Lemon* test, calling into question the test's viability); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting) (stating that the *Lemon* test "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Roehmer v. Bd. of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) (criticizing *Lemon* that "[t]he threefold test of *Lemon I* imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes") (citation omitted); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting) ("I am quite unreconciled to the Court's decision in *Lemon*. . . . I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country.").

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave . . . after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart

Lamb's Chapel, 508 U.S. at 398 (Scalia, J., concurring in judgment).

¹⁷² See, e.g., Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 597, 602–03 (1998) (explaining O'Connor's endorsement test); H. Wayne House, *A Tale of Two Kingdoms: Can There Be Peaceful Co-Existence of Religion with the Secular State?*, 13 BYU J. PUB. L. 203, 276–79 (1999) (observing the Court's recent use of the endorsement and coercion tests); Brian J. Serr, *A Not-So-Neutral "Neutrality": An Essay on the State of the Religion Clauses on the Brink of the Third Millennium*, 51 BAYLOR L. REV. 319, 333–35 (1999) (noting the endorsement and coercion tests); Jeremy Speich, *Santa Fe Indep. Sch. Dist. v. Doe: Mapping the Future of Student-Led, Student-Initiated Prayer in Public Schools*, 65 ALB. L. REV. 271, 276–79 (2001) (explaining the endorsement and coercion tests); Verginis, *supra* note 25, at 745–47 (discussing O'Connor's and Kennedy's alternative tests).

¹⁷³ Engstrom, *supra* note 170, at 137 (citing *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995)).

When government communicates a meaning that one religion over another, or that religion in general is preferable to secular notions, it effectively endorses religion. . . . [Thus,] [i]f a

has advocated the coercion test as the standard to replace the *Lemon* inquiry.¹⁷⁴ Under both the endorsement test and coercion test, however, the “Choose Life” license plate would violate the Establishment Clause.¹⁷⁵

a. Analysis Under the Endorsement Test

In articulating the endorsement analysis, Justice O'Connor defined “endorsement” to mean sending “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹⁷⁶ Whether this message is conveyed is determined from an “objective observer’s” standpoint.¹⁷⁷ Finally, this test is essentially “a combination of parts one and two of *Lemon*.”¹⁷⁸

“Choose Life” license plate statutes fail under this test for two reasons. First, delegating control of distribution of the funds generated by the pro-life plates to a religious organization certainly “favors” that religion. In *Women’s Emergency Network v. Dickinson*,¹⁷⁹ for example, the state of Florida delegated this responsibility to a Roman Catholic organization: Catholic Charities.¹⁸⁰ This entrustment gave Catholic Charities control of over half of a million dollars,¹⁸¹ permitting that religious group to determine which entities would receive the

State practice does not give the impression that the State is backing a certain religion or religion in general, then the practice passes muster under the Establishment Clause.

Id. at 136, 141.

¹⁷⁴ *Id.* at 139–40.

While decrying the use of a single test in this sensitive area, Justice Kennedy defined two principles that limit the accommodation of religion: Government may not coerce anyone to support or participate in any religion or its exercise, and it may not give direct benefits to religion under the guise of avoiding hostility towards religion.

Id. at 140.

¹⁷⁵ See *infra* Parts IV.A.3.a., .b.

¹⁷⁶ *Lynch v. Donnelly*, 465 U.S. 668, 688 (O'Connor, J., concurring). For more cases where Justice O'Connor discusses this test, see also *Aguilar v. Felton*, 473 U.S. 402, 422–30 (1985) (O'Connor, J., dissenting); and *Allegheny v. ACLU*, 492 U.S. 573, 623–32 (1989) (O'Connor, J., concurring).

¹⁷⁷ *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment).

¹⁷⁸ *Baugh*, *supra* note 172, at 597. The first part of the *Lemon* test requires that the statute or act have a secular legislative purpose and the second prong requires that its principal effect be one that neither advances nor inhibits religion. See *supra* notes 28–29 and accompanying text.

¹⁷⁹ 214 F. Supp. 2d 1308, 1314 (S.D. Fla. 2002).

¹⁸⁰ *Id.* The Roman Catholic pro-life belief is founded on its reading of Bible scripture and tradition. See *supra* note 146 and accompanying text.

¹⁸¹ See *supra* note 37 and accompanying text.

funds and which would not.¹⁸² This type of monetary power and discretion to award funds conveys political status and unquestionably communicates to an objective observer that this Christian religion, entrusted with such authority, is favored.

Second, as discussed above, the religious phrase "Choose Life" is a direct quotation from the Christian Bible.¹⁸³ As courts have previously recognized, phrases drawn from a Christian text "demonstrate a particular affinity toward Christianity."¹⁸⁴ As a result, an objective observer would interpret this demonstrated affinity as communicating the message that Christians are the favored insiders, while non-Christians are not.¹⁸⁵

b. *Analysis Under the Coercion Test*

Justice Kennedy's coercion test is a harder standard for pro-choice plaintiffs because of its higher threshold that must be met before action will be found unconstitutional.¹⁸⁶ Under this test, the "[g]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"¹⁸⁷ This "coercion" analysis focuses on the psychological impact on the observer, rather than on the underlying intent of the practice or statute.¹⁸⁸

¹⁸² See *supra* notes 37–40 and accompanying text. The courts in *Women's Emergency Network v. Dickinson*, 214 F. Supp. 2d 1308, 1314 (S.D. Fla. 2002), and *Henderson v. Stalder*, 287 F.3d 374, 379–80 (5th Cir. 2002), declined to find that the pro-choice plaintiffs had standing. This note asserts, however, that despite those rulings, the very delegation of such powerful monetary authority to any religious organization, such as Catholic Charities, even without evidence that the organization has advanced its ideology through distribution, causes an actual harm and confirms plaintiffs' standing to successfully allege an Establishment Clause challenge.

¹⁸³ See *supra* note 72.

¹⁸⁴ *ACLU v. Capitol Square Review & Advisory Bd.*, 210 F.3d 703, 727 (6th Cir. 2000).

¹⁸⁵ Indeed, the argument that both the delegation of authority to a Christian organization and the Christian phrase "Choose Life" fail O'Connor's endorsement test is consistent with her previous opinions. Cf. *Allegheny v. ACLU*, 492 U.S. 573, 637 (1989) (finding under this test a Christian nativity scene exhibited in a public courthouse violated the Establishment Clause).

¹⁸⁶ Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1143 (1997).

¹⁸⁷ *Allegheny*, 492 U.S. at 659 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Justice Kennedy also applied the coercion test in *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁸⁸ Serr, *supra* note 172, at 334 (explaining also that "the psychological coercion felt by a single member of the crowd would be enough to trump" everyone else's desires).

In *Lee*, a Supreme Court majority applied the coercion test¹⁸⁹ to prayer at public school graduations.¹⁹⁰ Attendance at graduation, although not mandatory for a diploma, was not entirely voluntary either because most students would want to attend this significant life event.¹⁹¹ Because the Court determined that the students could not avoid participation in the prayer if they attended graduation, they were “psychologically coerced.”¹⁹² Ultimately, the inclusion of the prayer violated the Establishment Clause because of the coercion and that the school district managed the decision to include the prayer at graduation.¹⁹³

Just as students are not required to attend graduation to receive their high school diplomas, individuals may not initially appear to be required to purchase a “Choose Life” license plate. If an individual wishes to purchase an anti-abortion or pro-adoption plate, however, “Choose Life” is the only alternative.¹⁹⁴ Significantly, this means that those people, whether non-Christian, agnostic, or atheist, are “coerced” to express an anti-abortion view through a Christian lens whether they wanted to or not.¹⁹⁵ Finally, and similar to the *Lee* school district in control of the decision to include prayer at graduation, the state decided in the license plate context to include the abortion topic and reject secular phrases in favor of the religious “Choose Life.”¹⁹⁶ Accordingly, this coercion and control resulting from the pro-life license plate statute violate the Establishment Clause under the coercion test.

¹⁸⁹ Despite applying the coercion test instead of adhering strictly to the *Lemon* test, the Court stated it was not, in effect, overruling *Lemon*: “We can decide the case without reconsidering the general constitutional framework by which public schools’ efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision” in *Lemon. Lee*, 505 U.S. at 587.

¹⁹⁰ *Id.* at 580–87.

¹⁹¹ *Id.* at 595.

¹⁹² *Id.* at 593–95. Jennifer Carol Irby, Note, *Santa Fe Independent School District v. Doe: The Constitutional Complexities Associated with Student-Led Prayer*, 23 CAMPBELL L. REV. 69, 74 (2000) (noting that the students at graduation were “psychologically coerced”).

¹⁹³ *Lee*, 505 U.S. at 588, 597, 599.

¹⁹⁴ See *supra* note 37, indicating that Florida is the only state that has actually produced and sold pro-life plates. Florida’s plate reads “Choose Life.” Moreover, an individual may have an extra incentive to purchase this specialty plate rather than, for example, a bumper sticker to express his or her abortion views. This incentive derives from the proceeds generated by the sale of the plates that would ostensibly go to fund the adoption program. The same financial benefit to a pro-adoption organization most likely would not result from the purchase of a pro-adoption bumper sticker.

¹⁹⁵ Displaying a “Choose Life” plate conveys a Biblical message, indicating that the purchaser holds the anti-abortion stance as a result of a particular Christian religious belief.

¹⁹⁶ For sources indicating that Louisiana halted production of the plate and the sale of the Florida “Choose Life” plates, see *supra* notes 14, 22 and 36 and accompanying text.

B. Viewpoint Discrimination: Pro-Life License Plate Statutes Are Unconstitutional Under the First Amendment Free Speech Clause

In addition to violating the Establishment Clause, the “Choose Life” license plate statutes are also unconstitutional under the First Amendment free speech clause because they impermissibly engage in viewpoint discrimination. Unlike the different analyses necessary in the Establishment Clause argument to demonstrate a violation, however, the free speech infringement is, to some extent, more direct.

1. Pro-Choice Plaintiffs Have Standing to Assert a Free Speech Claim

Similar to the pro-life defendants in *Hildreth* and both *Henderson* cases described earlier, the defendants in *Planned Parenthood v. Rose*¹⁹⁷ argued that the pro-choice plaintiffs lacked standing because the plaintiffs could not show that they suffered an injury that would be redressed by a decision in their favor.¹⁹⁸ Unlike those two earlier cases, however, the *Rose* court determined that the plaintiffs did have standing to challenge the “Choose Life” statute.¹⁹⁹

Rose’s persuasive conclusion relies on established Supreme Court precedent²⁰⁰ that holds that “a person or group excluded from benefits conveyed via an underinclusive [sic] statute has standing to challenge the statute on constitutional grounds, even if the effect of striking down the statute is to deny the benefit to the intended group and not to extend it to the plaintiffs.”²⁰¹ This authoritative precedent maintains that a plaintiff may assert a facial challenge even when the plaintiff had not applied for a license under the disputed statute.²⁰²

In addition, the cases holding that pro-choice plaintiffs lacked standing are unpersuasive because they dismiss too lightly *the threat* of the deprivation of First Amendment rights.²⁰³ The insidious danger of this loss of free speech is

¹⁹⁷ 236 F. Supp. 2d 564 (D.S.C. 2002).

¹⁹⁸ *Id.* at 567.

¹⁹⁹ *Id.* at 567–70.

²⁰⁰ In relying on this Supreme Court precedent, the *Rose* court also referred to the dissent in *Henderson II* that also examined this precedent. *Id.* at 567–69.

²⁰¹ *Id.* at 568.

²⁰² *Id.* (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 (1988)). The court also pointed to Fourth Circuit precedent that rejected arguments that plaintiffs lacked standing because they did not take steps to “ensure” their standing. *Id.* at 569 (quoting *Finlator v. Powers*, 902 F.2d 1158, 1161–62 (4th Cir. 1990)).

²⁰³ *Rose*, 236 F. Supp. 2d at 569–70. In support of this assertion, *Rose* also cites Supreme Court precedent that maintains that “[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.” *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n10 (1992) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

substantial in the "Choose Life" context: the pro-choice "plaintiffs are injured by the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing view."²⁰⁴ As a result of this injury, and of Supreme Court precedent that an excluded person or group may challenge an under-inclusive statute, pro-choice plaintiffs have standing to challenge the "Choose Life" statutes.

2. *"Choose Life" License Plates Are "A Clear Manifestation of Viewpoint Discrimination"*²⁰⁵

Regardless of the type of forum a license plate creates,²⁰⁶ "[d]iscrimination against speech because of its message is presumed to be unconstitutional."²⁰⁷ This means that when a state permits viewpoints on abortion to appear on license plates, it "may not target the 'particular views taken by speakers on [that] subject,' in an effort 'to discourage one viewpoint and advance another.'"²⁰⁸ Here, in the cases challenging the "Choose Life" license plates, a license plate expressing an alternative view on abortion is not available for pro-choice individuals to

²⁰⁴ *Rose*, 236 F. Supp. 2d at 570 (quoting *Henderson*, 287 F.3d at 387 (Davis, J., dissenting)).

²⁰⁵ *Id.* at 572.

²⁰⁶ Authorities are very divided on what type of forum a specialty license plate creates. One side argues that the plates establish a limited public forum (also known as the semi-public or designated public forum). *See, e.g.,* *Katz v. Dep't of Motor Vehicles*, 32 Cal. App. 3d 679, 685–86 (Cal. App. Ct. 1973); *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 948 (W.D. Va. 2001). Others, however, maintain that the license plate establishes a nonpublic forum. *See, e.g.,* *Pruitt v. Wilder*, 840 F. Supp. 414, 417 (E.D. Va. 1994); *Henderson v. Stalder*, 112 F. Supp. 2d 589, 597–98 (E.D. La. 2000); Laurie D. Medley, Note, *Frespch: Vanity Plates and the First Amendment*, 25 VT. L. REV. 879, 889–91 (2001). Yet a third group of authorities distinguish between specialty and vanity license plates, asserting the former to be limited public forums and the latter to be nonpublic forums. *See, e.g.,* *Guggenheim & Silversmith*, *supra* note 94, at 577–79.

This forum determination is significant, for example, in addressing the constitutionality of content-based regulations. For example, those types of restrictions are only permitted in a limited public forum if they are narrowly tailored to serve compelling governmental interests. *See, e.g.,* *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). On the other hand, government regulations in nonpublic forums must only meet a reasonableness test to be permissible. *See, e.g.,* *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

The designation is not crucial in this section, however, because as stated above, viewpoint neutrality is required *regardless* of the type of forum a specialty license plate creates.

²⁰⁷ *Rosenberger v. Rector*, 515 U.S. 819, 828 (1995).

²⁰⁸ *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1102 (D. Md. 1997) (quoting, in part, *Rosenberger*, 515 U.S. at 828–29).

purchase.²⁰⁹ By only offering the anti-abortion position on a specialty license plate, the state has assured, at least for some period of time, that only a pro-life view may be communicated. Thus, through the availability of only one viewpoint, the state advances the anti-abortion position while discouraging expression of the pro-choice perspective, violating the free speech clause guarantees.

Moreover, a pro-choice individual's inability to exercise his or her constitutional free speech rights for any amount of time, even if for a nominal period, "unquestionably constitutes irreparable injury."²¹⁰ Based on this premise, "[t]hose who want to express another point of view should not have to wait a year for the legislature to open the license plate forum" to a pro-choice plate.²¹¹ As a result, arguments are misplaced that emphasize that pro-choice plaintiffs who have failed to apply for their own plate though the legislative framework have not suffered any injury.²¹²

While cases like *Hildreth*, *Henderson* and *Rose* concerned plaintiffs in Florida and Louisiana who did not file for their own pro-choice plate,²¹³ there is some evidence of viewpoint discrimination and other inherent problems when pro-choice individuals in other states have attempted to do so.²¹⁴ Despite the standardized state requirements preceding approval of a specialty license plate, pro-choice groups may have a more difficult time obtaining their pro-choice plates, or might have to wait an even longer period of time before issuance of the plates, than their anti-abortion counterparts because of legislator bias.²¹⁵ In West

²⁰⁹ See, e.g., *Hildreth v. Dickinson*, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *7 (M.D. Fla. Dec. 22, 1999); *Henderson*, 112 F. Supp. 2d at 591; *Rose*, 236 F. Supp. 2d at 567-68.

²¹⁰ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

²¹¹ *Henderson*, 112 F. Supp. 2d at 601. In addition, the South Carolina District Court applied the same injury reasoning when it declared that the statute permitting pro-life plates was unconstitutional and that, as a result, "the [pro-choice] plaintiffs here have standing to mount a facial challenge to the statute without having applied for the issuance of a license plate bearing a slogan of their own choice." *Rose*, 236 F. Supp. 2d at 570.

²¹² The very availability of an anti-abortion plate, but not a pro-choice plate, creates the injury. See *supra* note 204 and accompanying text.

²¹³ See, e.g., *Hildreth*, 1999 U.S. Dist. LEXIS 22503 at *12; *Henderson*, 112 F. Supp. 2d at 595-96 (2000).

²¹⁴ Indeed, individuals may challenge a policy under the First Amendment even "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The *Henderson* court's recognition of pro-choice plaintiffs' speculative argument that there was no guarantee they would have obtained a plate in the current pro-life political climate, even if they had followed the statutory framework, exemplifies this. *Henderson*, 112 F. Supp. 2d at 600-01.

²¹⁵ See also *Rose*, 236 F. Supp. 2d at 570 (discussing discretion allotted to legislators). Legislators themselves may vote for or against a request for a specialty plate based on their own personal beliefs on abortion or public pressure, rather than on whether all of the statutory

Virginia, for example, when considering whether to include a "Choose Life" specialty plate, "[t]he vote was nearly 3-to-1 in favor of creating plates for abortion foes, and the same lopsided ratio against giving an equal right to the other side."²¹⁶ Thus, even applying for the plates does not even guarantee that

requirements were met or if a constitutional (First Amendment) violation would result. For articles acknowledging legislator bias or legislative sentiment favoring pro-life views, see for example, Jacobs, *supra* note 36, at 432 (noting that a "Choose Life" advocate recognized that "[i]t's easy to get things done in Louisiana because we have a very pro-life legislature") (internal citation omitted).

Favoritism for one side of the abortion debate may be the person or entity initiating or encouraging the "Choose Life" plates. In some states that have passed this legislation, like South Carolina, the idea for a "Choose Life" plate "was not the result of any formal petition by anyone seeking the issuance of such a plate," rather it was promoted by Senator Michael L. Fair "on his own initiative." *Rose*, 236 F. Supp. 2d at 566.

The potential for bias or favoritism to affect a government official's action on the abortion subject when that official should remain neutral is further exemplified in the criticism directed at Attorney General John Ashcroft and his ability to carry out his job fairly to protect constitutional rights when confronted with abortion issues. (He has a well-known personal position opposing the morality abortion.) See, e.g., *Ashcroft Must Support Clinics*, CAPITAL TIMES, Nov. 14, 2001, at 14A; William Claiborne, *A Decade Later, Abortion Foes Again Gather in Wichita*, WASH. POST, July 16, 2001, at A3; Mary Jacoby, *Bush Dedicates Justice Building to Robert F. Kennedy*, ST. PETERSBURG TIMES, Nov. 21, 2001, at 1A. Of course, the potential for bias is even greater in a popularly elected state legislator than in the Attorney General.

Finally, this impermissible legislative discretion in specialty plate applications may be compared to permit systems that require registration before an individual may speak. A permit system may be struck down as unconstitutional if the licensing authority has too much discretion, because it would risk the government's granting permits to favored speech and rejecting unpopular ones. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 926 (1997); *Rose*, 236 F. Supp. 2d at 572. *But see* Medley, *supra* note 206, at 897-901 (rejecting this comparison and that a challenge based on this premise would fail).

²¹⁶ Gzedit, *Tag Team License Plate Battle*, CHARLESTON GAZETTE, Feb. 2, 2002, at 4A. An earlier attempt to include a "Pro-Choice" plate was also rejected. Sam Trantum, *Anti-Abortion Plate Bill Advances Proposal Creating New Vanity Plate Sent to Full House*, CHARLESTON DAILY MAIL, Jan. 30, 2002, at 4A. West Virginia is not the only state that has passed "Choose Life" bills, but rejected pro-choice plates: South Carolina and Tennessee have as well. See, e.g., Jack Elliott Jr., *"Choose Life" Car Tag Survives While Pro-Choice Dies*, COM. APPEAL (Memphis), Mar. 7, 2002, at DS4 (stating that the "Choose Life" tag was passed the Tennessee House by 111 to 6, but that "an attempt to create a pro-choice tag died in the House Ways and Means Committee").

Furthermore, legislative manipulation, which may be inherent in a legislative process, also adds to the delay of pro-choice bill or the success of a "Choose Life" bill. For example, in South Carolina, "Choose Life" was first introduced as its own separate bill in the House. H.R. 3714, Leg., Spec. Sess. (S.C. 2001). In the last few days of the legislative session, "Choose Life" was added as an amendment to the popular bill sponsoring NASCAR specialty plates. See, e.g., *All Things Considered* (National Public Radio broadcast, Aug. 20, 2001). As a result, "Choose Life" supporters apparently helped to pass their bill by merging it with popular race car legislation.

pro-choice plaintiffs will not suffer delay and irreparable First Amendment injury.²¹⁷

C. Subject Matter Exclusion: The Abortion Issue Should Not Be on License Plates at All

Although states must be viewpoint neutral once a subject has entered a forum,²¹⁸ they are not completely forbidden to regulate on the basis of subject matter.²¹⁹ States therefore should choose not to permit *any* slogans, whether "Choose Life" or something like "Protect Choice," on the abortion subject on specialty license plates.²²⁰ First, this decision would square with precedent

Finally, the very structure of some states' legislative processes may provide opportunities for accelerating approval of anti-abortion plates or delaying the requests for pro-choice plates. For example, in Alabama a limited panel of legislators may approve a specialty plate without a full vote of the legislature. *See, e.g., Alabama Abortion Foes, supra* note 9. Having an even limited number of legislators vote on a pro-choice bill in an overwhelmingly pro-life legislature only increases the likelihood of bias in favor of a "Choose Life" bill. *See also, Jacobs, supra* note 36.

²¹⁷ Moreover, other state statutes regarding abortion may conflict with or constrain a pro-choice group's ability to express its abortion views on specialty license plates. For example, some state statutes prohibit the use of any public funds to be used in any way for abortion or for abortion as family planning; or they forbid sexual education or abortion counseling to minors, especially in school settings that might be the only place teens would have access to such information. *See, e.g., FLA. STAT. ANN. § 409.815* (West 2001); *LA. REV. STAT. ANN. §§ 17:281(F), 40:1299.34.5* (West 2001); *S.C. CODE ANN. §§ 43-5-1185, 44-122-30(B)* (Law. Co-op. 2001). Therefore when Planned Parenthood, an organization that counsels for and provides abortion services, petitions for a plate with the generated proceeds to go to groups that offer such abortion services, legislators may deny its request by pointing to the previous statutes.

Lastly, for a suggested solution to limit the overall problems of legislative bias in the specialty plate approval process, see *Jacobs, supra* note 36, at 469–73.

²¹⁸ *See supra* notes 68, 105 and accompanying text.

²¹⁹ *See, e.g., Rosenberger v. Rector, 515 U.S. 819, 829* (1995) (differentiating between regulation based on viewpoint and regulation based on subject matter); *cf. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 104–05* (2001) (noting the lower court's distinction between constitutional subject matter discrimination and unconstitutional viewpoint discrimination). *But see, e.g., Jacobs, supra* note 36, at 465 (maintaining that subject matter discrimination is also subjected to careful scrutiny); Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 340 (2000) (noting that subject matter discrimination restrictions must be narrowly drawn).

²²⁰ Unlike under viewpoint discrimination, it may make a difference in the ability to engage in subject matter discrimination whether a specialty license plate is characterized as a limited public forum or a nonpublic forum: Such restrictions might be more tolerated in a nonpublic forum. Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 158 (2000).

allowing the state to limit political speech and advertising²²¹ and with precedent somewhat limiting speech in the face of abortion violence.²²²

Moreover, this suggestion is in agreement with the opinions of many state legislators who oppose both groups' using specialty license plates as a medium to express abortion views. *See, e.g.,* Isabelle de Pommereau, *A New Strategy in the Abortion Fight?*, CHRISTIAN SCI. MONITOR, May 8, 1998, at 4 (reporting that one Florida House member believed that "I don't think we should be sanctioning political messages on Florida's license plates"); Judd, *supra* note 157 (noting that one Florida senator commented: "I just don't think a license tag is a proper place to express a political view."); Mark Lane, *Courts Might End Auto-Tag Proliferation*, COX NEWS SERVICE, Sept. 4, 2000, LEXIS, News Library, Wire Service Stories File (reporting that former Florida governor Lawton Chiles did not believe license plates were an appropriate forum for the abortion debate).

²²¹ *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (upholding a city law that permitted bus advertising except for political advertisements). Some assertions maintain that "Choose Life" (i.e., an abortion message) is not political or is no more political than other specialty license plates that are, for example, about the environment. *See, e.g.,* Fisk, *supra* note 2 (noting that Louisiana's assistant attorney general argued that the "Sportsman's Paradise" plate that was available might be just as political to "animal-rights folks"); Martel, *supra* note 9 (reporting that one senator commented, "[t]he black bear plate is fine, but that's an environmentalists' versus landowners' issue and you can't tell me that's not political. If we can save black bears, we can save babies.")

Arguments that the abortion topic does not differ from an issue like the environment, however, are fallacious. There is simply no comparison between "saving Louisiana's black bear" and the abortion debate for at least two reasons. First, abortion in particular is identified as a political party doctrine, with the Republican party generally adopting a pro-life stance. *See, e.g.,* Rebecca L. Andrews, Note, *The Unconstitutionality of State Legislation Banning "Partial-Birth" Abortion*, 8 B.U. PUB. INT. L.J. 521, 535 (1999) (noting how the Religious Right and the Republican party have a joined agenda to outlaw abortion); Alec Whalen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1052 (1997) (observing that the Republican party platform still calls for an amendment to ban abortions).

Second, abortion has clearly been a political issue for decades, illustrating its importance in the national political mind by acting as a litmus test for voters when it comes time to pick the President of the United States. *See, e.g.,* Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1398-99 (2000) (noting that abortion was a major issue in national politics); *CNN Talkback Live* (CNN television broadcast, July 25, 2000) (revealing one guest's information of "a study of the 1992 election that Bush's father lost, which showed that more than any single issue, bar none, abortion had the effect of swinging more voters"); Bruce Ramsey, *Messages in the Vote: Money, Lies, Social Security*, SEATTLE TIMES, Nov. 8, 2000, at B12 (observing that "[a]bortion was another issue that decided millions of votes" in the Gore-Bush election).

Thus, even though pro-life views on abortion may be expressed religiously as fundamental to a religious faith, abortion itself is a very political topic. *See, e.g., Henderson*, 112 F. Supp. 2d at 598.

²²² *See supra* Part III.A. Moreover, in the context of automobiles, the abortion topic and violence have already been linked. *See, e.g., Acid Dumped at 5 Florida Abortion Sites*, CHI. TRIB., May 22, 1998, at 4 (noting that abortion clinic attacks came a day after former Florida governor vetoed the "Choose Life" plates); Douglas Belkin, "Choose Life" Car Tags Stirring

Second, if *both* sides of the issue were not permitted to present their views on specialty plates, there would be no irreparable First Amendment injury. Indeed, the primary function of a license plate is identification,²²³ not for spreading a political (or religious) message. There is no harm in denying access to specialty license tags because, even if individuals may not express their abortion viewpoints on the plates, they may still paste bumper stickers on their automobile to state their positions.²²⁴ Finally, the alternative use of bumper stickers would also alleviate any concern about stifling discussion on the topic and the flow of ideas.

V. CONCLUSION

Although the abortion debate has been a divisive topic for decades in other contexts,²²⁵ that the "Choose Life" movement has used specialty license plates as a context in which to send its message has generated even more controversy over the last few years.²²⁶ Pro-choice advocates contested these license plates, alleging Establishment Clause and free speech violations.²²⁷ In the cases decided to date, these challenges have met with mixed success.²²⁸

As this note has examined, however, "Choose Life" license plates (both its phrase and fund distribution method) do violate the Establishment Clause whether the plates are examined under the *Lemon* test,²²⁹ the endorsement test,²³⁰ or the coercion test.²³¹ In addition, the "Choose Life" statutes are also unconstitutional

up Debate over Anti-Abortion Efforts, CHATTANOOGA TIMES, July 23, 2000, at A15 ("The license plate is a clear and present danger to the people of Florida. . . . It has been the rallying cry responsible for murders and vandalism, and it would give a green light to would-be terrorists."); Diane Rado, *Chiles Has 15 Days to Decide Abortion Bill*, ST. PETERSBURG TIMES, June 2, 1998, 4B (reporting "[w]hat beautiful timing" it was when clinic attacks coincided with veto of pro-life plates).

²²³ "A vehicle license plate is a state-imposed display of registered vehicle identification. That the state permits [some word and symbol combinations in specialty plates] is *purely incidental to the primary function of vehicle identification*." *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6, 10 (Ct. App. 1993) (emphasis added).

²²⁴ For sources maintaining that the use of bumper stickers is a good alternative to expressing views on license plates, see, for example, *id.* at 11–12 and Guggenheim & Silversmith, *supra* note 94, at 583–85. When both sides of an issue are not permitted to use a license plate to express a view does not raise the same concerns of fairness as when only one side's view has access to the forum.

²²⁵ See *supra* Part III.A.

²²⁶ See *supra* notes 9, 11 and accompanying text.

²²⁷ See *supra* Parts II, III.

²²⁸ See *supra* Parts II, III.

²²⁹ See *supra* Part IV.A.2.

²³⁰ See *supra* Part IV.A.3.a.

²³¹ See *supra* Part IV.A.3.b.

under the free speech clause because they impermissibly discriminate on the basis of viewpoint.²³²

Finally, specialty license plates should display *neither* pro-choice nor pro-life views.²³³ Banning this subject from the specialty license plate forum will not cause irreparable constitutional injury,²³⁴ particularly in light of the availability of bumper stickers, an alternative method to convey the same message.²³⁵

²³² See *supra* Part IV.B.

²³³ See *supra* Part IV.C.

²³⁴ See *supra* Part IV.C.

²³⁵ See *supra* Part IV.C.